90-380

No. 90——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.

DELAWARE & HUDSON RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAURENCE Z. SHIEKMAN
Counsel of Record
THOMAS E. ZEMAITIS
STEPHEN J. CIPOLLA
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

PAUL A. CUNNINGHAM
BRUCE R. STEWART
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036-1685
(202) 828-1200
Attorneys for Petitioner Consolidated Rail Corporation

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QUESTIONS PRESENTED

A vertically integrated producer allegedly having monopoly power in one line of commerce follows a concededly legitimate "make-or-buy" policy under which it is willing to buy a component of its output from a non-integrated competitor so long as the cost of buying the component does not exceed its cost of making the same component. The questions presented are these:

1. Is the producer required by Section 2 of the Sherman Act to sacrifice profits and efficiency by purchasing the competitor's component at a price exceeding its own cost of producing the same component?

2. Is a full-fledged trial required under Section 2 merely because the court believes that the producer's nonexclusionary, legitimate business practice may have been motivated in part by competitive animus?

3. Does the "essential facilities" doctrine alter the requirements generally applicable under Section 2 by proscribing an otherwise legitimate, profit-maximizing business practice merely because that practice may produce an "unreasonable" rate of increase in revenues?

LIST OF PARTIES AND RULE 29.1 LIST

The parties in the court of appeals were Consolidated Rail Corporation, petitioner herein, and Delaware and Hudson Railway Company, respondent herein. Consolidated Rail Corporation has no parent company. Consolidated Rail Corporation has the following subsidiaries:

1. Calumet Western Railway Company
2. Indiana Harbor Belt Railroad Company
3. CRC Properties, Inc.
4. Merchants Despatch Transportation Corp.
5. St. Lawrence & Adirondack Railway Company

Consolidated Rail Corporation has the following affiliates:

1. Akron & Barberton Belt Railroad Company
2. Albany Port Railroad Company
3. Belt Railway Company of Chicago
4. Chicago & Western Indiana Railway Company
5. Lakefront Dock & Railroad Terminal Company
6. Monongahela Railway Company
7. Nicholas, Fayette & Greenbrier Railroad Company
8. Peoria & Pekin Union Railway Company
9. Pittsburgh, Chartiers & Youghiogheny Railway Company
10. Transportation Data Xchange, Inc.
11. Trailer Train Company

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OPINIONS BELOW

The opinion of the court of appeals reversing summary judgment for petitioner Consolidated Rail Corporation ("Conrail") and remanding is reported at 902 F.2d 174 (2d Cir. 1990), and is reprinted in the appendix hereto ("Pet. App.") at 1a. The opinion of the district court granting summary judgment for Conrail is reported at 724 F. Supp. 1073 (N.D.N.Y. 1989), and is reprinted here at Pet. App. 14a. The opinion of the district court denying Conrail's motion to dismiss the complaint or, in the alternative, stay the litigation on primary jurisdiction grounds is reported at 654 F. Supp. 1195 (N.D.N.Y. 1987), and is reprinted here at Pet. App. 30a. The court of appeals' order denying Conrail's petition for rehearing is not reported, and is reprinted here at Pet. App. 50a.

JURISDICTION

The judgment of the court of appeals was filed on April 20, 1990 (Pet. App. 12a-13a), and a timely-filed

petition for rehearing was denied by order dated June 6, 1990 (Pet. App. 50a). This petition is being filed within 90 days of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

The pertinent statutory provision in this case is Section 2 of the Sherman Act, 15 U.S.C. § 2, which is set forth in full on the last page of the appendix hereto (Pet. App. 71a).

STATEMENT OF THE CASE

A. *Introduction*

This private treble-damage antitrust action was brought against Conrail by the Delaware and Hudson Railway Company ("D&H") under Section 4 of the Clayton Act, 15 U.S.C. § 15.[1] Conrail is a freight railroad operating in the northeastern and midwestern United States. D&H is a railroad operating in the northeast, principally in New York and Pennsylvania.

D&H alleges that Conrail has violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing or attempting to monopolize an alleged relevant market for the transportation of newsprint between eastern Canada and the mid-Atlantic states.[2] The newsprint traffic at issue

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[1] Section 4 allows "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [to] sue therefor . . . and . . . recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Section 4 and 28 U.S.C. § 1331 provide the basis for federal jurisdiction in this case.

[2] D&H had originally alleged a much broader relevant market but, in response to Conrail's motion for summary judgment, narrowed its proposed market definition. While Conrail disputes that D&H has correctly defined any relevant market, the parties agreed for purposes of Conrail's summary judgment motion that the market at issue is as described above. Pet. App. at 18a.

originates in Canada on Canadian railroads, and is then interchanged near the U.S. border, either (1) directly with Conrail for movement solely on Conrail's tracks to its ultimate destination in the mid-Atlantic region; or (2) with another carrier, such as D&H, which carries the traffic part of the way and then interchanges with Conrail for final delivery to the customer. D&H challenges the method Conrail used to determine the price Conrail would pay for D&H's participation in joint service for the U.S. portion of such shipments.

Conrail determined that price by a method known as "make-or-buy," which simply means that Conrail would not "buy" a service (in this case, D&H's rail transportation for part of a shipment) if it could "make" that service itself less expensively. The flip-side of this principle is that Conrail would not "sell" its services below its profit-maximizing price. "Make-or-buy" is the standard approach of any business that must decide whether to buy a particular component from a third party or to make it internally. The calculation is quite simple: if a third party is more efficient, then buying the component from that third party would be less expensive than making it; if internal manufacture is more efficient, then making would be less expensive than buying. For the economy as a whole, the result is efficient resource allocation, since the lowest cost producer will end up making the component at issue.

B. *Conrail's Make-Or-Buy Policy and D&H*

1. The transportation of newsprint at issue here involves two Canadian carriers, the Canadian National Railway Company ("CN") and Canadian Pacific Limited ("CP"). In 1982, these two carriers, responding to truck competition, individually proposed a series of reductions to the existing rates for specific point-to-point newsprint movements. In each instance, CN or CP was the exclusive rail carrier serving the origin station. For the ma-

jority of routes affected by the Canadian proposal, Conrail was the exclusive rail carrier serving the destination point. The existing rate typically was the same for all possible routes between the Canadian origin and the destination, including routes where Conrail interchanged directly with the Canadian carrier, routes where D&H could serve as an intermediate carrier, and routes where railroads other than D&H could serve as intermediate carriers.

Each Canadian proposal to reduce a particular newsprint rate was communicated to both Conrail and D&H with the condition that the Canadian carrier's historic division [3] of revenue would remain the same. Subtracting the Canadian carrier's division from the proposed rate permitted Conrail to apply its make-or-buy analysis. Under the existing divisions, this analysis uniformly showed that Conrail would earn the greatest "contribution" [4] when it "made" the component itself, that is, when Conrail interchanged directly with the Canadian carrier and moved the traffic the entire route to its ultimate destination, and that it would cost more to buy the participation of an intermediate carrier such as D&H. Thus, Conrail agreed to the new, lower rates proposed by the Canadian carriers over those routes that yielded Conrail the greater profit, i.e., those without intermediate carriers.

In most cases, D&H then sought Conrail's concurrence in the application of the reduced rate to movements that included D&H as an intermediate carrier. Conrail notified D&H that it would neither concur in the reduction at the old division levels between Conrail and D&H nor

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[3] "Division" refers to the portion that each participating railroad receives of the amount paid by a shipper for the overall, origin-to-destination shipment.

[4] "Contribution" is the contribution to fixed costs and profit that a carrier receives for moving freight over any part of a route, i.e., the revenue less the variable costs associated with that freight movement.

"buy" service from D&H at a less profitable revenue level than if Conrail were to "make" that service itself. Conrail offered to buy D&H's services only at a price equal to its own cost of providing the same service, i.e., only if its contribution for the joint movement equaled its contribution for the single-line Conrail route.[5] D&H then had to decide whether it would charge a price for its portion of the joint service that would have made the joint service price-competitive with Conrail's single-line service.

The effect of Conrail's proposal would have been to reduce D&H's historic division for the U.S. portion of the overall shipment. D&H rejected this proposal and insisted on its historic division, thus preventing the reduced rates from taking effect if D&H were included in the route. Neither the originating Canadian shippers nor CN and CP were affected by this impasse, because they continued to demand—and receive—the lower origin-to-destination rate from Conrail.[6]

2. This impasse between Conrail and D&H resulted from a regulatory evolution in the rail industry. The divisions D&H sought to retain were vestiges of the

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[5] For example, suppose that Conrail charged $100 to move traffic from the point of interchange to the ultimate destination, and that Conrail had an internal cost of $50 to move the traffic over that part of the route over which D&H could also move the traffic. Under the make-or-buy analysis, if D&H were to charge Conrail $45 to move the traffic over its intermediate route, Conrail would offer to "buy" D&H's participation, since doing so would increase Conrail's contribution by $5. If, however, D&H were to charge $55, Conrail would not offer to "buy" D&H's participation, since doing so would reduce Conrail's profits by $5. In all cases, Conrail chose the most efficient, profit-maximizing routing.

[6] It bears noting that CP is now in the process of buying D&H; if that purchase is accomplished, CP will have the same decision whether to provide service itself or buy it from Conrail. It also bears noting that CP's requests for and receipt of rate reductions from Conrail in other markets evidences CP's strong bargaining position.

regulatory system that had begun changing in the mid-1970s in response to the steady decline of the domestic rail industry after World War II. The decline reached crisis proportions with the bankruptcies of Conrail's predecessors, the Penn Central Transportation Company and other rail carriers in the northeast and midwest. Confronted with the imminent collapse of rail service in a large part of the country,[7] Congress in 1973 passed the Regional Rail Reorganization Act, Pub. L. 93-236, 87 Stat. 985 ("3R Act"), which authorized the government to oversee the reorganization and consolidation of the bankrupt railroads.[8]

At the same time, Congress began to investigate why the financial health of the rail industry had so badly deteriorated. It found that the crisis was due substantially to a pervasive, inflexible regulatory scheme administered by the Interstate Commerce Commission ("ICC") and a collective approach to ratemaking followed by the railroads. *See, e.g.*, S. Rep. No. 499, 94th Cong., 1st Sess. 10-11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 23-25; H.R. Rep. No. 1430, 96th Cong., 2d Sess. 111, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4143. Among the most uneconomic practices was the railroads' collective maintenance of a nationwide system of equalized rates, which both undermined overall industry profitability and hindered individual railroads' efforts to achieve greater efficiency and to compete successfully with other transportation modes.[9]

Prior to passage of the 3R Act, the ICC's avowed policy had been to avoid price competition among railroads of-

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[7] *See* S. Rep. No. 601, 93d Cong., 1st Sess. 7-9, *reprinted in* 1973 U.S. Code Cong. & Admin. News 3242, 3248-50.

[8] Conrail was created to acquire and to provide rail service over the rail properties formerly owned and operated by the Penn Central and five other bankrupt railroads. *See generally Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

[9] *See generally* T. Keeler, *Railroads, Freight and Public Policy* 24-32 (1983).

fering alternative routes between a particular origin and destination. Rates were set collectively in "rate bureaus" so as to equalize the charges over all routes regardless of the relative efficiency of the routes or carriers involved. While prices over such alternative routes were equalized, the costs were not equal. Because rates were generally maintained at levels high enough to permit participation of even the least efficient railroads, rate equalization subsidized inefficient railroads and routes while drawing traffic away from more efficient but under-utilized routes. Railroad rates were thus generally higher than truck rates, and railroads lost business to trucks.

This crisis led Congress to conclude that extensive regulatory reform was essential if the domestic rail industry was to survive without being nationalized. It first enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4R Act"), then the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"). The Staggers Act mandates that the ICC, to the maximum extent possible, allow independent, demand-based pricing (49 U.S.C. § 10101a; H.R. Rep. No. 1430, *supra*, at 79), and assist efficient railroads to attain revenue adequacy (49 U.S.C. § 10704). The Act further instructs the ICC to minimize its regulatory oversight of rates (49 U.S.C. § 10101a), but provides for continued regulation of rate reasonableness only if the ICC determines that a carrier has market dominance over the transportation to which a particular rate applies (49 U.S.C. § 10701a).[10]

The ICC has pursued these directives. Most pertinent here, it has approved a ratemaking policy identical to Conrail's make-or-buy policy. In *Guilford Transp. Indus., Inc.—Control—Boston & Me. Corp.*, 5 I.C.C.2d 202, 218 (1989), the ICC found that

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[10] The ICC has not found that Conrail has market dominance for the newsprint traffic at issue.

> [f]rom the standpoint of financial incentives, we would expect Guilford to seek a division on the MEC-CN route that provides the Guilford system a dollar contribution above its attributable costs of service at least equal to the dollar contribution above its attributable costs that Guilford receives from movements over the long-haul route. . . . We could not regard such a division policy as anticompetitive; it would merely reflect the cost of the alternative means of providing service available to Guilford.[11]

The rail industry supports the make-or-buy approach.[12]

C. *Course of Proceedings and Disposition Below*

D&H's original complaint challenged virtually all of Conrail's new rate policies as anticompetitive insofar as they affected D&H by eliminating the subsidies D&H enjoyed under the old regulatory system. After extensive discovery and in response to Conrail's motion for summary judgment, however, D&H pared its claims to encompass only Conrail's response to the series of rate re-

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[11] The companies adopting and supporting the make-or-buy approach in *Guilford* are D&H's parent and sister companies.

[12] For example, in testimony in 1985 on behalf of the Association of American Railroads ("AAR"), Professor William Baumol and (then) Professor Robert Willig stated that "each of the parties in a voluntary negotiation over the terms of a vertical relationship such as a joint route will earn the greatest profit available to it if it selects as its partner, in each transaction, the entity that is in a position to carry it out most efficiently and cheaply." Reply Verified Statement of William J. Baumol and Robert D. Willig, *Intramodal Rail Competition*, ICC Docket Ex Parte No. 445 (Sub-No. 1) (July 5, 1985), Pet. App. at 65a. D&H was a member of the AAR at the time of this submission and did not dissent. Excerpts from the Verified Statement and Reply Verified Statement of Messrs. Baumol and Willig in that proceeding are set forth at Pet. App. 59a-66a. In addition, excerpts from the Verified Statement of Professor Baumol in *Iowa Power and Light Co. v. Burlington Northern R.R.*, ICC Docket No. 40224 (May 21, 1990), are set forth at Pet. App. 51a-58a.

ductions for newsprint traffic proposed by CN and CP. But the make-or-buy analysis underlying that response forms the foundation of Conrail's systemwide ratemaking. Thus, D&H's claims, even as truncated, challenge the basic premise of Conrail's (and most other rail carriers') rate methodology established in response to Congress' deregulation of the industry.[13]

Conrail moved for summary judgment, arguing that, as a matter of law, its make-or-buy policy was not anticompetitive. Alternatively, Conrail argued that D&H had failed to present significant, probative evidence of a relevant market for newsprint transportation or of Conrail's monopoly power in that alleged market.

On November 20, 1989 the district court granted summary judgment for Conrail and dismissed D&H's complaint in its entirety. Pet. App. at 29a. The district court held that Conrail's make-or-buy policy was lawful, finding that D&H had "not provided [the] court with one instance where Conrail refused to concur in joint rates with D&H where concurrence with D&H would have been more profitable for Conrail than non-concurrence. Thus D&H has failed to show how this make or buy policy . . . was anything but a valid business policy of Conrail, and therefore not violative of Section 2." Pet. App. at 23a.[14] The district court also rejected D&H's argument that Conrail's terms for permitting D&H to participate in newsprint movements were unreasonable and had foreclosed D&H from participation in the newsprint movements in violation of the so-called "essential

[13] *See generally* the Verified Statement of Professors Baumol and Willig, Pet. App. at 59a-62a.

[14] The court of appeals did not disagree with this finding. The district court also found—and again the court of appeals did not disagree—that it "would have been unprofitable for Conrail to concur in joint rates with D&H in situations where [Conrail] would have received more contribution if Conrail, alone, carried the freight." Pet. App. at 22a.

facilities" doctrine, holding that Conrail's make-or-buy policy did not create unreasonable terms of access.[15] Finally, in light of its holding that the conduct at issue was profit-maximizing and therefore lawful,[16] the district court did not reach the monopoly power issue.

On April 20, 1990 the court of appeals reversed and remanded for trial. *Id.* at 11a. The court of appeals noted "[t]he fact that profit maximization is a goal of the make or buy policy," and stated that that fact "provides support for an argument that the policy is a legitimate practice." *Id.* at 7a. The court held that there was a triable issue—and thus that a jury could ultimately hold Conrail liable for monopolization—solely on the basis of (1) the deposition testimony of Conrail's former senior vice president for marketing, which the court characterized as showing that "the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits";[17] (2)

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[15] D&H trains would not physically enter Conrail's tracks; rather, D&H sought only to interchange newsprint traffic with Conrail. "Access" was thus merely a financial arrangement. As the district court found, Conrail "was, at all times, willing to allow D&H the use of Conrail's tracks, via joint rates with D&H, as long as the overall contribution Conrail received for the job would have been no less than the amount it would receive for non-participation." Pet. App. at 26a. "In the instant case, the plaintiff has failed to prove that Conrail denied D&H the use of Conrail's tracks. Therefore, the plaintiff cannot prevail in its antitrust claim utilizing the essential facilities doctrine." *Id.*

[16] "Clearly," the district court held, "profit maximization is a legitimate business goal. The defendant's make or buy policy's sole goal is profit maximization. Therefore, this court finds that the defendant has not engaged in exclusionary conduct violative of Section 2." Pet. App. at 24a.

[17] The court of appeals mischaracterized the testimony. The relevant colloquy simply reflected the profit-maximizing nature of Conrail's make-or-buy policy:

Q. So whether Conrail's participation in traffic other than its long haul was profitable or not, you understood the policy

statements of Conrail employees "that a shift of D&H's traffic to Conrail would be desirable"; (3) a Conrail analyst's statement that D&H would be unlikely to concur in a joint rate under the make-or-buy policy; and (4) the court's inference that the make-or-buy policy injured D&H, an inference not based on any evidence of actual injury to D&H, but only on a Conrail employee's statement that he favored a monopoly. *Id.*

The court of appeals also held that there was a triable issue whether the make-or-buy policy unlawfully denied access to an "essential facility." This invocation of the controversial "essential facilities" doctrine was based on the purported increased revenues (over the historic divisions) Conrail would realize if D&H had accepted Conrail's make-or-buy based offers for joint service. This "issue" arose from the court's reliance on a hypothetical example created by the district court under which Conrail's revenues for some movements would increase by 800% under the make-or-buy policy.[18] *Id.* at 10a.[19]

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goal to be to divert that traffic to Conrail's long haul if that long haul generated the most profit for Conrail?

A. Yes. The idea was for us, if we were going to participate in the traffic, as a prudent businessman, you would try to, to maximize your contribution, not your gross dollars, but your contribution dollars. . . .

Dep. of James A. Hagen at 56 (Dec. 8, 1987).

[18] The district court had created a hypothetical example and supplied hypothetical prices to illustrate the operation of the make-or-buy policy. Pet. App. at 22a & n.7. Repeatedly citing the purported 800% increase and treating it as a fact, the court of appeals held that there was a triable issue whether Conrail had unreasonably denied D&H access to its tracks.

[19] Conrail had also raised its lack of monopoly power as an alternative ground for affirming the district court. The court of appeals stated that it was "not presented with a well-developed record on that question," which the district court had not decided; nevertheless, without identifying the relevant facts in dispute, it was "persuaded that D&H [had] presented" a triable issue. Pet. App. at 8a.

On May 4, 1990 Conrail timely filed its Petition for Rehearing and Suggestion for Rehearing En Banc. The court of appeals denied the petition for rehearing on June 6, 1990. *Id.* at 50a.

REASONS FOR GRANTING THE WRIT

A.

1. The law of this Court is that antitrust cases should not go to trial unless the facts asserted by plaintiff, if proven, would show injury to competition, i.e., injury to consumers. In this case, the court of appeals ignored that doctrine and held that a firm's decision not to buy a component of its output at a price higher than its internal cost of producing the same component requires a judicial determination whether the decision was accompanied by competitive animus or would result in an "unreasonable" rate of increase in profits. That erroneous holding is plainly anticompetitive and requires review by this Court.

D&H and Conrail disagree over the share of revenue that D&H should receive when it provides joint services with Conrail that parallel services provided by Conrail alone. Conrail offered to buy D&H's service at a price equal to Conrail's own cost of such service. But D&H wanted more; it wanted to maintain the revenues it had received under a regulated scheme of inter-railroad subsidies that Congress and the ICC abandoned precisely because that scheme prevented railroads from being profitable, competitive and responsive to consumer demand.

Of course, under settled antitrust law, if Conrail's business practice is otherwise legitimate (and the court of appeals recognized it was), neither Conrail's alleged intent nor the degree of increase in profitability raises a genuine issue of material fact for trial. Neither bears on whether Conrail's offer would exclude competition or injure consumers. The effect of the decision below is

that the district court will have to abandon its role as an antitrust court and instead set itself up as a regulator to determine "fair" business practices and "reasonable" rates of increase in profits.

The court of appeals' decision requires review by this Court because (1) contrary to the antitrust laws and this Court's decisions thereunder, it holds that legitimate, efficiency-enhancing and nonexclusionary business practices may nevertheless be held unlawful, thereby chilling firms from undertaking such procompetitive practices; (2) it would impose significant costs on the economy by requiring vertically integrated firms to subsidize less efficient, non-integrated competitors (thereby frustrating the very purpose of the antitrust laws, which is to encourage vigorous competition among competitors); (3) it is contrary to the economic requirements of the troubled railroad industry and the uniform national regulatory system established by Congress to regulate railroad revenue division disputes and rate reasonableness; and (4) it conflicts with the decisions of this Court and with those of other circuits.

2. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985), this Court's most recent decision interpreting Section 2 of the Sherman Act,[20] the Court reserved the question "whether nonex-

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[20] Section 2 prohibits monopolization, attempts to monopolize and conspiracies to monopolize. "The offense of monopoly under § 2 . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). D&H alleged, and the court of appeals found, a triable issue regarding attempt to monopolize. It is undisputed that conduct lawful for a monopolist cannot form the basis of an attempt claim. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 373 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); III P. Areeda & D. Turner, *Antitrust Law* ¶ 828a at 321 (1978). Accordingly, if the decision below is reversed with respect

clusionary conduct could ever constitute an abuse of monopoly power if motivated by an anti-competitive purpose." Similarly, in *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104, 118 n.12 (1986), the Court reserved the question "whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation."

This case squarely presents those issues. The district court found, and the court of appeals did not disagree, that Conrail's make-or-buy policy, which was uniformly applied to ensure procurement of a component of service from the lowest-cost source (either by supplying the service internally or buying it from D&H), maximized Conrail's profits. Yet, the court of appeals held that there was a triable issue on the basis of evidence it characterized as showing anticompetitive purpose. This case thus raises the question left open in *Aspen* and *Cargill*: whether a nonexclusionary practice coupled with alleged anticompetitive intent can ever constitute an abuse of monopoly power.

Of course, this question must be answered by reference to the underlying theory and purpose of the antitrust laws (*see Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987) (Kennedy, J.)), which is to benefit consumers, not to entrench or preserve inefficient competitors. *Atlantic Richfield Co. v. USA Pet. Co.*, 110 S. Ct. 1884, 1890-93 & n.7 (1990).[21] Thus, in *Aspen*,

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to the monopolization claim, it must also be reversed with respect to the attempt claim.

[21] In *Atlantic Richfield*, the court of appeals had reversed summary judgment for ARCO, holding that injury to a competitor was sufficient to establish a triable issue on injury to competition. *USA Pet. Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988). This Court reversed the court of appeals, holding that a nonpredatory maximum pricing scheme can never exclude a rival unless the rival is relatively inefficient. 110 S. Ct. at 1891 n.7. If D&H were more efficient than Conrail, it had an opportunity to partici-

472 U.S. at 605, the Court held that the question whether conduct may properly be characterized as exclusionary cannot be answered by considering only its effect on competitors; to be held unlawful, the conduct must also impair competition (i.e., injure consumers), and it must do so on some basis other than efficiency.[22] Review is necessary to make clear that legitimate, nonexclusionary conduct can *never* constitute an abuse of monopoly power.

3. D&H's claim makes no economic or antitrust sense. It makes no economic sense because, as shown *supra* at 3, 5, 8 n.12, Conrail's make-or-buy analysis is the most efficient, cost-minimizing approach to the decision whether to provide service itself or to buy the same service from D&H. More generally, D&H's position, if upheld, would

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pate in the joint service from which it claims to have been excluded. Here, there is no dispute, nor any allegation, that Conrail ever set its prices below its costs. Thus, D&H's relative inefficiency, not Conrail's pricing strategy, was the cause of D&H's alleged exclusion.

[22] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593-98 (1986) (injury to plaintiffs irrelevant unless plaintiffs could also show that consumers would be injured by having to pay higher prices in the long run); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31 (1984) (tying arrangement did not injure consumers and, accordingly, defendant was entitled to judgment as a matter of law; plaintiff's injury was irrelevant); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*'" (emphasis in original; quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))). *See also Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 726-27 (1988) (refusing to apply *per se* rule in dealer termination case because there was no showing that termination, "without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output"); *Northwest Wholesale Stationers, Inc. v. Pacific Stationergy & Printing Co.*, 472 U.S. 284, 289, 295-96 (1985) (plaintiff's expulsion from a buying cooperative, "while certainly a restraint of trade," held lawful because it would not "characteristically be likely to result in predominantly anticompetitive effects," i.e., injury to consumers).

actually injure consumers: a firm required to purchase a component from a competitor at a price higher than the firm's own cost of producing the same component would either pass along its higher costs to consumers, or it would exit the marketplace, unable (because of those higher costs) to compete against other, efficient competitors. D&H's claim makes no antitrust sense because the make-or-buy policy, as a cost-minimizing, efficiency-enhancing practice, *cannot* injure consumers.[23]

Because D&H's claim makes no economic or antitrust sense, summary judgment is mandated. *Matsushita*, 475 U.S. at 587, instructs that an antitrust claim that "simply makes no economic sense" should not go to trial. This rule is necessary as a matter of both antitrust policy and judicial economy. "[T]he statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). As a matter of anti-

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[23] In response to the Canadian railroads' requests to reduce rates to meet truck competition, as the court of appeals found, "Conrail agreed to lower its rates on trips where it was the sole American carrier." Pet. App. at 4a. Thus, consumers, far from being injured, have benefited from Conrail's conduct. The divisions that D&H wants would not produce a still lower price to shippers. Rather, D&H is simply seeking to divert to itself the contribution that Conrail would otherwise earn if Conrail were to carry the traffic the entire route. In short, if D&H prevails, shippers will not pay less; if Conrail prevails, shippers will not pay more. Thus, the *only* issue raised by D&H's complaint is how the amount paid by the shippers for the U.S. portion of the transportation will be divided between Conrail and D&H, now that divisions are to be based on the free market rather than rigid regulation. That is of no concern whatever to the shippers, the receivers, the Canadian railroads or the antitrust laws. *See, e.g., Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir.) (utility's refusal to sell power to shopping mall developers for resale at retail rates did not violate antitrust laws because plaintiffs wished simply "to pre-empt [defendant's] business for their own profit, not as true competitors for the same market"), *cert. denied*, 449 U.S. 870 (1980).

trust policy, summary judgment is necessary to forestall meritless and vexatious claims that inhibit firms from maximizing efficiency and thereby promoting the interests of consumers. As a matter of judicial economy, summary judgment is one of "the principal tools by which factually insufficient claims . . .[can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

B.

In *Aspen*, this Court held that the question whether conduct may properly be characterized as exclusionary *cannot*, as a matter of law, be answered by simply considering its effect on competitors; rather, it must impair competition in an unnecessarily restrictive way, i.e., " '*on some basis other than efficiency*.' " 472 U.S. at 605 (emphasis added; quoting R. Bork, *The Antitrust Paradox* 138 (1978)).

The court of appeals misapplied *Aspen*. It acknowledged that the make-or-buy policy promoted efficiency—"profit maximization is a goal of the make or buy policy"[24] and, accordingly, "the policy is a legitimate practice" (Pet. App. at 7a)—but nevertheless held that the policy could be held unlawful based on evidence it characterized as showing anticompetitive intent. *Id.*[25]

This result, if allowed to stand, would frustrate antitrust policy by chilling countless firms throughout the

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[24] The evidence compels this conclusion. *See supra* at 9-10 & nn. 14-16.

[25] In *Aspen*, the Court concluded that the record supported a jury finding that Ski Co. had excluded on a basis other than efficiency in light of evidence that Ski Co. sacrificed short-term profits so as to eliminate its only competitor over the long run and that it lacked any other legitimate business justification for its conduct. 472 U.S. at 610. In this case, by contrast, short-term profit maximization was the express goal and undisputed effect of the challenged conduct.

economy from engaging in any number of similarly legitimate practices merely because their vigorous competition may subject them to the prospect of treble-damage antitrust liability. Moreover, the decision below conflicts with the decisions of other courts of appeals. Following *Aspen*, the First, Fifth, Seventh and Ninth Circuits have held that a legitimate business practice is immune from Section 2 liability, even if there is also evidence of injury to a particular competitor or anticompetitive intent. In *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1109-13 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 473 (1990), the First Circuit affirmed a judgment notwithstanding the verdict where the challenged business policy lowered defendant's costs, even though there was record evidence both that plaintiff was injured and that defendant hoped its policy would injure plaintiff. *See also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231-32 (1st Cir. 1983).

The Fifth Circuit has held that, under *Aspen*, "the sufficiency of a legitimate business justification [may not be weighed] against the anticompetitive effects of a refusal to deal in order to find intent by a defendant to monopolize." *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988). Rather, the existence of a legitimate business justification has a "preclusive effect" against antitrust liability, even if there is anticompetitive intent. *Id.*

In *Olympia*, 797 F.2d at 373, 379, the Seventh Circuit held that Western Union was not required to subsidize competitors by having its salesmen promote their products, even though plaintiff (a competitor) was injured as a result. Further, evidence that Western Union intended that "these turkeys [i.e., plaintiff] . . . be flushed" by its conduct was deemed irrelevant. Similarly, in *A.A. Poultry Farms, Inc. v. Rose Acres Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1326

(1990), the Seventh Circuit held that an objectively nonpredatory pricing policy was lawful despite evidence that defendant hoped thereby to run plaintiff out of business.

And the Ninth Circuit has held that "the desire to maintain market power—even a monopolist's market power—cannot create antitrust liability if there was a legitimate business justification for" the challenged conduct. *Oahu Gas Serv., Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 369 (9th Cir.), *cert. denied*, 109 S. Ct. 180 (1988). On that basis, the court found lawful a monopolist's decision to forgo propane production for the benefit of a competitor despite evidence of anticompetitive intent, because such production would not have been "economically efficient" for the monopolist. *Id.* at 368.

Review is necessary both to resolve the conflict created by the decision below and to prevent the court of appeals' preoccupation with a company's alleged intent from chilling perfectly lawful conduct that the antitrust laws are intended to promote.[26] Legitimate, procompetitive business practices are *by definition* designed to take business away from rivals; there is nothing wrong with such a desire: "Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run." *Olympia*, 797 F.2d at 379. Thus, it has "become an antitrust commonplace . . . that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Id.*

The court of appeals' use of "intent" as a barometer of anticompetitive conduct wrongly shifts the focus from

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[26] Given the number and scope of companies subject to suit in the Second Circuit, the decision below will have a particularly deleterious effect on vigorous competition.

the actual effects on consumers to a necessarily subjective analysis of the state of mind of the defendant and its employees. But "the nature and consequences of a particular practice are the vital consideration, not the purpose or intent." III P. Areeda & D. Turner, *Antitrust Law* ¶ 626 at 76 (1978). Moreover, contrary to the very purpose of the antitrust laws, such an approach deters firms alleged to have monopoly power from engaging in legitimate, procompetitive practices by threatening them with treble-damage antitrust liability. *A.A. Poultry*, 881 F.2d at 1402.[27]

The court of appeals was plainly correct in recognizing that Conrail's profit-maximizing make-or-buy policy was "legitimate" (Pet. App. at 7a), both as a matter of settled antitrust law, which allows even monopolists to maximize profits,[28] and under the new scheme of deregulation established by Congress and the ICC.[29] Businesses every-

[27] *A.A. Poultry* also accentuates why these issues should be resolved at the summary judgment stage: "Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation." 881 F.2d at 1402.

[28] *See, e.g., Ocean State Physicians*, 883 F.2d at 1111 & n.11 ("any buyer of goods or services . . . is lawfully entitled to bargain with its providers for the best price it can get"; "achieving lower costs is a legitimate business justification under the antitrust laws"); *Oahu Gas*, 838 F.2d at 368-70 (decision to limit output by forgoing propane production had a legitimate business justification because production would not have been "economically efficient"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296-98 (2d Cir. 1979) (lawful for firm with monopoly power to take actions to maximize profits), *cert. denied*, 444 U.S. 1093 (1980); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 704 (8th Cir.) (en banc) ("optimum monopoly pricing" policy a procompetitive, legitimate practice), *cert. denied*, 469 U.S. 872 (1984).

[29] The decision below would reverse this process of deregulation by returning to the regulated world of the old divisions among railroads—but with a difference. In the regulatory environment that

where use a make-or-buy analysis to determine whether to buy a component in the production process or to make it internally. Such an approach maximizes profits by minimizing costs; it is without doubt an efficiency-enhancing and therefore legitimate business practice that can only benefit customers.

C.

This case starkly evidences the dangers in applying the so-called "essential facilities" doctrine to profit-maximizing behavior, presenting an ideal opportunity for the Court to clarify and appropriately to limit the doctrine, which is "now loose in the lower federal courts." M. Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L.J. 395, 397 (1986) ("Boudin").[30]

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preceded the 4R and Staggers Acts, the ICC was prospectively responsible for approving and otherwise monitoring the joint rates and divisions of railroads. Under the "new" regulatory environment created by the decision below, the "fair" and "reasonable" division between a railroad and its competitors will be determined retroactively in the courts, with the railroad subjected to treble-damage liability whenever a jury decides it does not like the railroad's pricing decision.

[30] This Court "has never acknowledged the essential facility doctrine." G. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U.L.J. 433, 480 (1987) ("Werden"). Although most essential facility cases in the lower courts invoke previous decisions of the Court, this Court's decisions "do not speak of [the doctrine] and can be explained without reference to it." P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 841 (1990) ("Areeda"). Indeed, "when one examines the Supreme Court decisions commonly cited for the doctrine by lower courts, they do not offer much support." Boudin, 75 Geo. L.J. at 398. Even in the lower courts,

> the cases support the [essential facilities] doctrine only by implication and in highly qualified ways. You will not find any case that provides a consistent rationale for the doctrine or that explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share it with a rival. It is less a doctrine than an epithet . . . .

Areeda, 58 Antitrust L.J. at 841.

There is no standard formulation of the doctrine; a typical one is that "[a]ny company which controls an 'essential facility' or a 'strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them." *United States v. AT&T Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981).[31] The court of appeals applied a similar formulation. Pet. App. at 9a.

Such formulations render the essential facilities doctrine contrary to mainstream Section 2 law. Section 2 requires an analysis of the competitive effects of a decision not to deal, including a showing that defendant has monopoly power; even then, there is no duty to deal if there is an efficiency or other legitimate business justification for not dealing. Under the decision below (and other essential facilities cases), however, a company's efficiency-enhancing make-or-buy policy may be held unlawful solely because a factfinder might conclude that the policy could produce an "unreasonable" rate of increase in revenues. In addition, the essential facilities doctrine, as articulated by the court of appeals and other lower federal courts, dispenses with analysis of competitive effects.

This case thus squarely presents the question whether the essential facilities doctrine permits recovery that

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[31] The essential facilities doctrine has received much scholarly criticism. Professor Areeda argues that the doctrine "needs to be brought back to antitrust policy." Areeda, 58 Antitrust L.J. at 841. Boudin found that "most acute commentary rejects" the notion that "a monopolist controlling an essential facility has a duty to deal with competitors" because such a notion "would curtail efficiency or prove impossible to administer." Boudin, 75 Geo. L.J. at 401. Werden urges the courts to abolish the doctrine altogether. Werden, 32 St. Louis U.L.J. at 480. *See also* Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 Va. L. Rev. 1069 (1988) ("Note").

would otherwise be unavailable under Section 2. The effect of the decision below (and other essential facilities cases) is to give plaintiffs two opportunities for treble damages under Section 2, one under mainstream monopoly law and one under the essential facilities doctrine. There is no basis for this result; if plaintiff cannot show its entitlement to relief under conventional Section 2 law, it should not be allowed to escape the consequences of that inability by relying on the essential facilities doctrine.

This Court's previous decisions suggest that there is no difference between mainstream Section 2 law and the essential facilities doctrine: while the lower courts had decided *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *Aspen* under the essential facilities doctrine, this Court declined to do so and instead decided them under conventional Section 2 principles. *Otter Tail*, 410 U.S. at 377-78; *Aspen*, 472 U.S. at 611 n.44. Review is necessary to make clear what is only implicit in those decisions—that the essential facilities doctrine does not provide a loophole for a claim that would otherwise fail under Section 2.

1. The court of appeals held that there was a triable issue under the essential facilities doctrine as to the reasonableness of the make-or-buy policy in light of its belief that, as a result of implementation of the policy, Conrail's revenues would increase by 800% over some lines: "While it is difficult to extrapolate economic reasonableness from one case to another, we hold that a sudden price rise of 800% raises a genuine issue of material fact." Pet. App. at 10a.

This holding makes the essential facilities doctrine conflict with settled Section 2 law, which allows and indeed expects firms with monopoly power to charge profit-maximizing prices. *See supra* at 18-20 & n.28. This is true even if doing so entails a significant price increase (reflecting, in this case, Congress' decision to abandon a

regulatory scheme precisely because it yielded an insufficient return to the railroads). In addition, requiring Conrail to forgo the same contribution it would receive if it handled the shipments at issue itself would quite plainly force Conrail to subsidize D&H. In this respect, the court of appeals' holding is contrary to the well-established Section 2 principle that even a firm with monopoly power need not give a competitor a "free ride" by subsidizing the competitor's business. *Olympia*, 797 F.2d at 377.[32]

In addition to departing from settled Section 2 law in holding that there was a triable issue whether Conrail's make-or-buy policy is "reasonable" under the essential facilities doctrine, the court of appeals also misapplied summary judgment principles. There is no evidence *in the record* to support its finding of "a sudden price increase of 800%." That number was derived entirely from a *hypothetical* used by the district court to illustrate how the make-or-buy policy works (Pet. App. at 22a & n.7) and was neither drawn from nor supported by the record. The fact that a purely hypothetical application of the make-or-buy policy, using hypothetical numbers, would result in substantial increases in Conrail's revenues for one particular movement does not create a genuine issue of material fact for trial. "It is the record made on summary judgment that controls, not that record plus speculative inferences a trier of fact might add." *Richards*, 810 F.2d at 902. The court of appeals' hold-

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[32] Other courts of appeals have followed these Section 2 principles in rejecting essential facilities claims. In *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081, 1088 (7th Cir. 1990), the Seventh Circuit held that "Illinois Bell's business decision to switch from cost-based pricing to market-based pricing" for listing information was a "legitimate business" decision, not an unreasonable denial of an essential facility. *See also Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976 (9th Cir. 1988) (limiting access to stadium to one trade show per year to highest bidder not unreasonable denial of essential facility).

ing is not supported by the record, but rests on no more than a "metaphysical doubt" of the sort this Court has held to be insufficient. *Matsushita*, 475 U.S. at 586. Therefore, summary judgment is appropriate.

2. The court of appeals assumed that Conrail's tracks from the D&H interchange to the ultimate destination constituted an "essential facility" on the ground that physical duplication of Conrail's lines would be impractical from D&H's standpoint. *See* Pet. App. at 9a. The consequences of this assumption are dramatic. Most shipper locations are served by only one railroad so that, under this assumption, the tracks from the shipper's location to the first interchange and from the last interchange to the ultimate destination will always constitute an "essential facility." Under this approach, there will be literally tens of thousands of such "essential facilities."

This approach, which is similar to that taken by other lower courts in determining that a facility is essential by reference to competitors and not competition,[33] creates an unsupportable distinction between the essential facilities doctrine and settled Section 2 law. Under Section 2 law, a duty to deal is not imposed unless (1) a firm is found to have monopoly power and (2) "some cooperation" between the monopolist and its competitors "is indispensable to effective competition." *Olympia*, 797 F.2d at 379.

More recent cases considering essential facilities claims have properly focused on whether forcing access to a facility is necessary for competition and to promote consumer interests. *E.g., Flip Side Prods., Inc. v. Jam Prods., Ltd.*, 843 F.2d 1024, 1033 (7th Cir.), *cert. denied*, 109 S. Ct. 261 (1988); *Mid-South Grizzlies v. Na-*

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[33] *E.g., Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

tional Football League, 720 F.2d 772, 779 (3d Cir. 1983) (NFL franchise not an essential facility to which a would-be entrant was entitled, because adding another football team would not have increased competition or lowered prices; it would simply have permitted one more team to share television revenues), *cert. denied*, 467 U.S. 1215 (1984). Plainly, the approach taken in *Flip Side* and *Mid-South* is consistent with the fundamental purpose of the antitrust laws to benefit consumers, not to protect individual competitors.[34]

In this case, the court of appeals dispensed with the traditional Section 2 requirement that sharing the "essential facility" under the terms demanded by plaintiff be indispensable to effective *competition*. Instead, it held that Conrail, when it is the only railroad serving the destination, could be required to set its price at a less-than-profit-maximizing rate, even though doing so would not reduce price to the consumer or increase output. At best, sharing under the terms demanded by D&H would have absolutely no effect on either consumers or competition.[35] As with plaintiffs in *Mid-South* and *Alemeda Mall*

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[34] "A single firm's facility . . . is 'essential' only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace." Areeda, 58 Antitrust L.J. at 852. The mistake in focusing on whether a facility is essential to a particular competitor is that "[s]uch a focus provides little or no guide for parsing efficient and anticompetitive behavior. * * * [I]n evaluating the desirability of a duty to deal in [essential facility cases], the test should be consumer welfare." Note, 74 Va. L. Rev. at 1093, 1071. Moreover, "[n]o one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. *Such an improvement is unlikely . . . when the plaintiff merely substitutes itself for the monopolist or shares the monopolist's gains*." Areeda, 58 Antitrust L.J. at 852 (emphasis added).

[35] CN and CP proposed rate reductions to meet truck competition. D&H's own expert opined that trucks had captured as much as 25% of the newsprint transportation at issue. There is no

(*see supra* n.23), D&H is simply trying to "substitute itself" for Conrail so as to "share" in Conrail's profits.

3. The court of appeals' view of the essential facilities doctrine, if accepted, raises problems that are beyond the ability of the antitrust laws or the courts to solve. *First*, the district court found that the price Conrail offered for D&H's participation was efficient, and the court of appeals did not disagree. *See supra* at 9-10. The court of appeals thus held that there are aspects of an efficient, non-exclusionary price that are subject to antitrust review, on the basis of non-efficiency factors, for "reasonableness." But neither the court of appeals nor, to our knowledge, any other court has set forth any standards for determining when an efficient price is "unreasonable."[36] Thus,

> it is not clear at all whether a monopolist may engage in hard bargaining to reach the arrangement most favorable to itself, or whether it may simply refuse an unreasonable request for access. When negotiations over access fail to produce an agreement, it is unclear how blame is to be assessed and potential liability determined.

Werden, 32 St. Louis U.L.J. at 456. The decision below will necessarily cause firms that are willing to deal with their competitors to avoid price negotiation for fear that, as in this case, negotiation to obtain a profit-maximizing price may result in treble-damage claims. Such a result would be contrary to the purpose of the antitrust laws, which is to promote vigorous competition.

Second, on remand to decide whether the make-or-buy policy is reasonable, the factfinder will necessarily have to determine both a reasonable price for access and

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evidence that D&H's presence was essential to maintaining competition for newsprint traffic.

[36] Rate reasonableness determinations are the province of regulatory agencies. *See infra* at 28-29.

what level of profitability to permit Conrail. Moreover, if Conrail's profit-maximizing price, while legitimate (in the court of appeals' view), is found to be "unreasonable," "the reasonable" price will have to be fixed retrospectively in order to measure D&H's alleged damages and establish the conditions under which Conrail must permit D&H to earn its subsidy.

This will be the first case in which such issues will be decided in a private antitrust suit.[37] "The federal courts . . . are not well equipped to set a 'fair price.' " *Consolidated Gas*, 665 F. Supp. at 1512. In *Byars v. Bluff City News Co.*, 609 F.2d 843, 864 (6th Cir. 1979), the Sixth Circuit stated that, in the absence of a regulatory agency to "obviate problems of judicial price setting . . . the difficulty of setting a price at which the monopolist must deal might well justify withholding relief altogether." *Accord* Areeda, 58 Antitrust L.J. at 853 ("No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.").

Judicial consideration of these complex issues would also frustrate Congress' desire to have a *uniform* na-

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[37] To be sure, other courts have imposed a duty to deal (*e.g.*, *MCI*, *Otter Tail*, *Consolidated Gas Co. v. City Gas Co.*, 665 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir.), *vacated and reh'g granted*, 889 F.2d 264 (11th Cir. 1989)), but each of those cases left the ultimate price determination to the relevant regulatory agency. Here, Conrail has offered to buy D&H's participation; the *sole* issue is price. The only aspect of that issue that is pertinent to an antitrust court's responsibility is whether the price is efficient (i.e. non-exclusionary), not whether it is otherwise "reasonable." The latter issue is for regulatory agencies. In this case, the ICC has already spoken to the rate reasonableness issue. It has eschewed non-efficiency factors and has approved make-or-buy pricing, finding that such pricing is *not* anticompetitive. *See supra* at 7-8.

tional railroad policy.[38] Conrail operates throughout the midwest and northeastern United States. The court may on remand decide the "fair" and "reasonable" profit level for Conrail in its dealings with D&H in the market here at issue. But a court in Chicago may someday have its opportunity to decide what is fair and reasonable and, still later, one in Pittsburgh may get its chance. Such a result is plainly irrational; no business could possibly operate in such an environment.

The antitrust laws are not concerned about whether Conrail's rates are "fair" or "reasonable." *If* Conrail truly has market dominance and *if* its rates truly are not "reasonable" or "fair," then the ICC is the appropriate body to determine what is "fair" and "reasonable". *See* 49 U.S.C. § 10701a.[39] Congress has chosen the ICC—not antitrust courts—to regulate rate reasonableness. Neither the "essential facilities" doctrine nor traditional Section 2 law gave the court of appeals authority to override that congressional determination.

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[38] D&H itself recognized the danger of judicial interference with the regulatory scheme designed by Congress in opposing Conrail's motion (based on primary jurisdiction principles) to dismiss or stay the litigation. Conrail had argued that D&H's claims created the potential for conflict between antitrust law and regulatory policy and requested that the court allow review by the ICC to obviate the possible conflict. D&H sought to allay any fears of such a conflict by unequivocally asserting that its complaint created "no potential for conflict between the regulatory and antitrust regimes because D&H is *not* challenging the reasonableness of Conrail's rates and charges or whether they are in the public interest," matters "entrusted to the ICC." Memorandum of Law of Delaware and Hudson Railway Company in Opposition to Motion to Dismiss the Complaint (filed Nov. 14, 1988) at 23-24 (emphasis supplied).

[39] The court of appeals was flatly wrong in its apparent assumption that deregulation had "left to the railroads" all decisions regarding joint rates. Pet. App. at 3a.

CONCLUSION

For the foregoing reasons, Conrail's petition for a writ of certiorari should be granted.

Respectfully submitted,

LAURENCE Z. SHIEKMAN
Counsel of Record
THOMAS E. ZEMAITIS
STEPHEN J. CIPOLLA
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

PAUL A. CUNNINGHAM
BRUCE R. STEWART
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036-1685
(202) 828-1200

Attorneys for Petitioner
Consolidated Rail Corporation

Dated: September 4, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1123, Docket 89-9034

DELAWARE & HUDSON RAILWAY COMPANY,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Appellee.

Argued April 4, 1990

Decided April 20, 1990

James K. Manning (Elizabeth Storch, and Brown & Wood, New York City on the brief) for appellant Delaware & Hudson Ry. Co.

Thomas E. Zemaitis, Philadelphia, Pa. (Laurence Z. Shiekman, Stephen J. Cipolla, Michael A. Ceramella, and Pepper, Hamilton & Scheetz, Philadelphia, Pa., Scott A. Barbour, and McNamee, Lochner, Titus & Williams, Albany, N.Y., Bruce B. Wilson, Constance L. Abrams and Consol. Rail Corp., Philadelphia, Pa., on the brief) for appellee Consol. Rail Corp.

Before FEINBERG, TIMBERS and WALKER, Circuit Judges.

TIMBERS, Circuit Judge:

Appellant Delaware & Hudson Railway Co. ("D & H") appeals from a summary judgment entered Novem-

ber 20, 1989 in the Northern District of New York, Neal P. McCurn, *Chief Judge,* in favor of appellant Consolidated Rail Corp. ("Conrail") in this antitrust action. 724 F.Supp. 1073 (N.D.N.Y.1989).

The district court found that D & H failed to raise a genuine issue of material fact with respect to any of its three claims, viz. monopolization, denial of an "essential facility" and attempted monopolization. On appeal, D & H asserts as error the district court's rejection of each of these three claims. It asserts that the court misconstrued the applicable law and, contrary to the approved practice at the summary judgment stage, failed to draw proper factual inferences in its favor.

After careful consideration, we hold that D & H's contentions are meritorious. For the reasons which follow, we vacate the judgment of the district court and remand the action.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

A brief overview of recent developments in the freight railroad industry may help to place this dispute in context. Conrail was organized in the early 1970's in an effort to preserve the viability of freight transportation by rail in the northeastern and midwestern United States. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 108-09 (1974). Several large railroads, including the giant Penn Central, had become insolvent. Congress saw as the solution a single system run on a for-profit basis. *Id.* Subsequently, Conrail absorbed still more insolvent railroads.

D & H is a much older and smaller system than Conrail. It controlled about 1,700 miles of track at its peak, while Conrail controls about 17,000. Conrail does not challenge the fact that, as a result of the disparity, D &

H is forced to rely on Conrail's system in order to compete. In the market involved on this appeal—shipment of newsprint from eastern Canada to locations in the mid-Atlantic states of this Country—only Conrail can provide transport from start to finish in most instances.

An example used by the district court and by both parties in their briefs may illustrate the parties' relationship: A newsprint shipper seeks to have newsprint delivered from a point in Quebec, Canada, to Lancaster, Pa. There are two relevant options. One option would entail delivery via a Canadian railroad to Conrail's border facility. Conrail then would carry the cargo on its tracks for the entire journey. Under the other option, after receiving the cargo at its border facility, D & H would carry the cargo on its tracks only as far as Harrisburg, Pa. From there, it would have to complete the journey on Conrail's tracks.

Most of D & H's newsprint shipments therefore require the cooperation of Conrail. That cooperation takes the form of "joint rates". A joint rate is a cooperative rate—less than the sum of the separate rates of the individual railroads—charged to the shipper when the shipment requires the use of the tracks of two or more railroads. Each railroad's share of the rate usually is in proportion to the percentage of miles traveled on that railroad's tracks.

Until 1980, the Interstate Commerce Commission required cooperation in the setting of joint rates. In that year Congress moved to deregulate the railroads. The Staggers Rail Act of 1980, 49 U.S.C. § 10101 *et seq.* (1988), left to the railroads the decision whether or not to cooperate, albeit subject to antitrust and other laws. H.R.Conf.Rep. No. 1430, 96th Cong., 2d Sess. 83 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin.News 3978, 4110, 4114.

The dispute leading to this appeal arose when Canadian shippers and railroads sought to lower rates so that

rail carriage of newsprint could compete more readily with carriage by truck. Conrail agreed to lower its rates on trips where it was the sole American carrier. It did not decline outright to cooperate in cases where it was the secondary ("short haul") carrier to D & H, but instituted a policy, called "make or buy", that achieved the same effect. Under that policy, Conrail would agree to the reduced rate only if its profit, called "contribution", matched its profit on the route where it was the sole carrier.

The effect of the make or buy policy can be demonstrated by reference to the example referred to above. On a Quebec-Lancaster carriage entirely on Conrail tracks, Conrail would earn $30,000 in revenue, less $20,000 in costs, for a contribution of $10,000. Prior to the make or buy policy, Conrail's revenue for the Harrisburg-Lancaster short haul route, when D & H was responsible for the long haul, would be $2,000, less costs of $750, for a contribution of $1,250. The make or buy policy was intended to assure that Conrail would receive the same contribution for any carriage in which it participated, whether it was the short or long haul carrier. Accordingly, under its new policy, Conrail demanded a contribution of $10,000 for the Harrisburg-Lancaster short haul route, an increase of 800%. The price for D & H's failure to agree to those terms was the denial by Conrail of any joint rates.

Conrail's action placed D & H in a bind between giving up almost all of its profits on a given route and losing entirely the ability to carry freight on the route. It decided not to concur in joint rates where the make or buy policy was in effect. It commenced the instant action in July 1986. In June 1988, D & H sought protection under Chapter 11 of the United States Bankruptcy Code.

After surviving a motion to dismiss, 654 F.Supp. 1195 (N.D.N.Y.1987), and after extensive discovery, D & H's antitrust claims were rejected by the district court on

Conrail's motion for summary judgment. The three claims, all of which relate to the same product market (shipment of newsprint from eastern Canada to the mid-Atlantic states) and the same conduct (Conrail's make or buy policy), are those set forth in the second paragraph of this opinion.

From the summary judgment rejecting these claims, this appeal was taken by D & H which asserts that, since there are genuine issues of material fact with respect to the three claims, summary judgment was improper. We agree.

II.

On an appeal from a summary judgment, we review the record de novo to determine whether there are genuine issues of material fact. Fed.R.Civ.P. 56(c). We assess the record in the light most favorable to the non-movant and we draw all reasonable inferences in its favor. *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2 Cir.1989). The non-movant, however, who must sustain the ultimate burden of proof, must demonstrate in opposing a summary judgment motion that there is some evidence which would create a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Conclusory allegations will not suffice to create a genuine issue. There must be more than a "scintilla of evidence," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), and more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

III.

We turn first to the question whether the make or buy policy constituted the offense of monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2 (1988). To establish the defendant's liability, the plaintiff must demonstrate "(1) the possession of monopoly power in the relevant

market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

(A)

Addressing the second element first, we must affirm the district court's ruling unless D & H has demonstrated that there is a genuine issue of material fact as to whether Conrail's make or buy policy constituted willful anti-competitive conduct in the relevant newsprint transportation market. Conrail's most significant contention in this regard is that, since the policy was intended to increase short-term, as well as long-term, profits, Conrail is insulated from liability.

Conrail finds support for this contention primarily in two opinions. The first is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). There the Court affirmed a decision that the defendant had engaged in actionable conduct in its refusal to continue cooperating with a competitor. The Court held that a monopolist would not be liable merely because its actions adversely affected a competitor, if such actions were motivated by a valid business justification. *Id.* at 605. In determining that there was no valid justification, the Court found significant the fact that the defendant "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-11. Conrail infers from *Aspen Skiing* that conduct which has profit maximization as a goal cannot violate § 2.

Conrail finds further support for this contention in *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir.1988). There, we approved a jury instruction which included the following:

> "[A] monopolist is under no duty affirmatively to help or aid its competitors and is free to set as its legitimate goal the maximization of its own profits *so long as it does not exercise its power to maintain that* [*monopoly*] *power.*"

Id. at 1361 (emphasis added).

The plain language of the above excerpt from *United States Football League* demonstrates that Conrail's contention is incorrect. The fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice, but does not shield the policy from judicial scrutiny. A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits. *Aspen Skiing* does not hold to the contrary.

Our review of the record in the instant case satisfies us that there is evidence which would support a jury finding that Conrail is liable for monopolization. Here are a few examples: First, James Hagen, Conrail's former Senior Vice President—Marketing, stated that the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits. Second, several Conrail employees, including its President, Stuart M. Reed, stated that a shift of D & H's traffic to Conrail would be desirable. Third, David Kalapos, an analyst for Conrail, stated that D & H would be unlikely to concur in a joint rate under the make or buy policy as its profits "would be almost ludicrously low." Fourth, there is no question that D & H was harmed by the implementation of the policy. D & H introduced in evidence a letter from a Conrail vice president stating "I'm for a monopoly in total! . . . So let's Conrail take and rationalize the entire D & H."

We agree with the district court that the vice president's letter, standing alone, would not give rise to a § 2 violation. *Ocean State Physicians Health Plan v. Blue*

Cross & Blue Shield of R.I., 883 F.2d 1101, 1113 (1 Cir.1989), *cert. denied*, 110 S.Ct. 1473 (1990); *Olympia Equipment Leasing Company v. Western Union Tel. Co.*, 797 F.2d 370, 373, 379 (7 Cir. 1986) (intent that "these turkeys . . . be flushed" did not give rise to liability), *cert. denied*, 480 U.S. 934 (1987). In view of the evidence referred to above, however, we hold that D & H has proffered evidence sufficient to support a verdict in its favor by a reasonable jury on the question whether Conrail's conduct violated § 2. Obviously, therefore, this issue could not properly be decided against D & H on a motion for summary judgment.

(B)

The district court assumed for purposes of argument that Conrail had monopoly power in the relevant market, transportation of newsprint from eastern Canada to the mid-Atlantic states. Conrail now asserts as an alternative ground for affirming the district court that this assumption was incorrect: D & H's evidence on the subject, it contends, was insufficient to create a triable issue.

D & H's expert witness, Gordon Fay, stated in an affidavit that Conrail had two-thirds of the market in rail transportation of newsprint and one-half of the total market (including truck transportation). While market share is not the sole factor in the determination of market power, it is a highly significant one. *Broadway Delivery Corp. v. United Parcel Service, Inc.*, 651 F.2d 122, 128 (2 Cir.), *cert. denied*, 454 U.S. 968 (1981).

The parties and the district court seem not to have devoted significant attention to the question of monopoly power. Conrail did not even take the deposition of the witness Fay. We are not presented with a well-developed record on that question. Nevertheless, on the record before us, we are persuaded that D & H has presented a genuine issue of material fact as to monopoly power, precluding summary judgment in favor of Conrail on this issue.

IV.

We turn next to the question whether the make or buy policy constituted denial of an essential facility and, by implication, a violation of § 2. The alleged essential facility is Conrail's tracks used for short haul routes, e.g., the Harrisburg-Lancaster tracks in the hypothetical Quebec-Lancaster run. The district court rejected D & H's claim, relying on the four-factor test set forth in *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7 Cir.) ("(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."), *cert. denied*, 464 U.S. 891 (1983); *see also Twin Laboratories, Inc. v. Weider Health & Fitness*, No. 89-7972, slip op. at 2898 (2 Cir. April 9, 1990) (applying *MCI*).

There is no question that Conrail controls the short haul tracks, thus satisfying the first element. With respect to the second element, we agree with the district court's statement that "physical duplication of [Conrail's] lines would be an impractical and unreasonable project to undertake." 724 F.Supp. at 1079. The fourth element, feasibility, is demonstrated by the fact that D & H was permitted continuous use of the tracks until the make or buy policy foreclosed that use.

The third element—whether Conrail impermissibly denied to D & H the use of the tracks—is the one on which the district court based its decision. The court held correctly that there need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable. In this context the following passage is particularly appropriate:

> "Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner,

upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."

United States v. Terminal Railroad Assoc., 224 U.S. 383, 411 (1912); *see also* Areeda & Hovenkamp, Antitrust Law ¶ 736.1, at 700-01 (1989 Supp.).

We disagree, however, with the district court's conclusion that the terms of the make or buy policy were reasonable as a matter of law. We return to the earlier illustration to make the point clear. Prior to the implementation of the policy, Conrail received a contribution of $1,250 for D & H's use of its Harrisburg-Lancaster tracks. Under the policy, Conrail demanded a contribution of $10,000, an increase of 800%. The magnitude of that increase may be sufficient in itself to create a triable issue as to whether the terms were unreasonable. Whether it is or is not, however, the various statements of Conrail executives, excerpted above, support our conclusion that there is a triable issue.

The relatively sparse case law on this question supports our conclusion. In *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F.Supp. 1309 (D.Md.1989), the court found that the defendant's offer to transport cargo for $.01 per ton above the defendant's own variable cost was reasonable. *Id.* at 1323-24. While it is difficult to extrapolate economic reasonableness from one case to another, we hold that a sudden price rise of 800% raises a genuine issue of material fact under *Laurel Sand*.

We need not determine on this appeal the circumstances under which a legitimate business practice will shield a defendant from liability for conduct that otherwise would constitute denial of an essential facility. *MCI*, *supra*, 708 F.2d at 1133 (suggesting that a legitimate practice may serve as a shield from liability). In

our discussion above on the monopolization claim, we held that there is a genuine issue of material fact with respect to the question whether the make or buy policy was a legitimate practice. That holding is equally applicable here.

V.

D & H also contends that the make or buy policy constituted the § 2 offense of attempted monopolization. To make out a successful claim of attempted monopolization, a plaintiff must demonstrate: (1) anti-competitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power. *International Distrib. Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790 (2 Cir.), *cert. denied*, 482 U.S. 915 (1987). These elements essentially track those required for a successful monopolization claim. We held with respect to the monopolization claim that the development and implementation of the make or buy policy raised triable issues on the questions of conduct and intent. Likewise, evidence of Conrail's monopoly power that is sufficient to withstand a motion for summary judgment also suffices to raise a triable issue as to whether there was a dangerous probability that Conrail would obtain monopoly power.

VI.

To summarize:

We hold that there are genuine issues of material fact with respect to whether the development and implementation by Conrail of its make or buy policy constituted the antitrust offenses of monopolization, denial of essential facilities and attempted monopolization.

Nothing in this opinion is to be construed as an expression of our views on the merits of the issues to be tried. All we hold today is that there are genuine issues of material fact which should not be decided by summary judgment.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of April, one thousand nine hundred and ninety.

Present: HON. WILFRED FEINBERG
HON. WILLIAM H. TIMBERS
HON. JOHN M. WALKER, JR.
Circuit Judges,

89-9034

DELAWARE & HUDSON RAILWAY COMPANY,
Appellant,

-v.-

CONSOLIDATED RAIL CORPORATION,
Appellee.

Appeal from the United States District Court
for the Northern District of New York

[Filed Apr. 20, 1990]

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said District Court in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro,
EDWARD J. GUARDARO,
Deputy Clerk

MANDATE: June 19, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

86-CV-810

DELAWARE & HUDSON RAILWAY COMPANY,
Plaintiff,

-v-

CONSOLIDATED RAIL CORPORATION,
Defendant.

Appearances:	Of Counsel:
JAMES K. MANNING, ESQ. Counsel for the Trustee in IN Bankruptcy of Plaintiff One World Trade Center New York, NY 10048	PAUL WINDELS, III, ESQ. ELIZABETH STORCH, ESQ.
MCNAMEE LOCHNER TITUS & WILLIAMS Local Counsel for Defendant 75 State Street Albany, NY 12202	SCOTT A. BARBOUR, ESQ.
PEPPER HAMILTON & SCHEETZ Counsel for Defendant 3000 Two Logan Square 18th and Arch Streets Philadelphia, PA 19103	THOMAS E. ZEMAITIS, ESQ.

NEAL P. MCCURN, C.J.

MEMORANDUM-DECISION AND ORDER

[Filed Nov. 17, 1989]

In *Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 654 F.Supp. 1195 (N.D.N.Y. 1987), this court denied Consolidated Rail Corporation's ("Conrail's") motion to stay or dismiss the plaintiff's complaint pursuant to the

doctrine of primary jurisdiction.[1] *Id.* at 1203. In this proceeding, Conrail moves for summary judgment against the plaintiff, Delaware & Hudson Railway Company ("D & H"). For the reasons stated below, defendant's motion for summary judgment is granted.

Background

Familiarity with this case is presumed, and the following is based primarily on the background presented in *Del. & Hudson Ry. Co.*, 654 F.Supp. 1195, 1197-98 (N.D.N.Y. 1987).

D & H is a Delaware corporation which provides rail transportation services throughout the mid-Atlantic region.[2] Conrail is a Pennsylvania corporation, established pursuant to the Regional Rail Reorganization Act of 1973, Pub.L.No. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. § 741). Conrail was organized by Congress in part because of the collapse of regional railroads in the 1970's. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). Conrail provides rail transportation services to both the Northeast and the Midwest.

D & H and Conrail are competitors. However, because of the nature of the railroad business, railroads jointly participate in the use of rail facilities, since no one railroad can provide service to every shipper location in the United States.

To enable railroads to provide national service, railroads participate in "through routes", which are business arrangements made between two or more railroads where

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[1] Conrail sought a stay or dismissal of the plaintiff's complaint, so that the Interstate Commerce Commission could consider D & H's claims prior to this court's determination.

[2] Since the commencement of this lawsuit, D & H has filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101.

they agree to move freight in continuous carriage between the origin on one railroad and the final destination on another. Railroads also operate "single line routes". On a single line route, the entire railway, from origin to destination, is owned by one railroad. Larger railroads, such as Conrail, own many of these single line routes. Smaller railroads, such as D & H, often must interconnect with the larger railroads, via through routes, to provide service to major metropolitan areas.

Competition between different companies is affected, to an extent, by regulations that railroads must follow. Prior to the late 1970's, price competition between railroads was considered to be unhealthy for both the railroad industry and the consumer. Consequently, the establishment and regulation of rates was the province of the Interstate Commerce Commission ("I.C.C."). This situation changed with the passage of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub.L.No. 96-448, 94 Stat. 1895 ("Staggers Act"). The Staggers Act was enacted in order to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101a(1). Among other changes resulting from this Act, the Staggers Act stripped the I.C.C. of all jurisdiction to review rates and charges except in limited circumstances. *See* 49 U.S.C. §§ 10701a and 10709.

In October 1982, Conrail implemented a rail-rate policy in order to maximize its profits. This rate-making policy, known as Conrail's "make or buy" policy, is central to the instant dispute. D & H alleges that this policy is exclusionary and unlawful in its implementation, while Conrail asserts that the make or buy policy is a legitimate, profit-maximizing program.

D & H has sued Conrail, alleging violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). D & H

claims that Conrail has monopolized, and attempted to monopolize, the market consisting of the transportation of newsprint from Eastern Canada to the mid-Atlantic states.[3] D & H claims that certain policies of Conrail, in particular Conrail's make or buy policy, are anti-competitive. Conrail has moved for summary judgment on all claims against D & H.

DISCUSSION

1. The monopolization claim.

(a) Elements

For D & H to successfully prove a violation of the Sherman Antitrust Act, it must meet the requirements stated in *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698 (1966). The Supreme Court held that:

> (t)he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Grinnell at 570-71, 86 S.Ct. at 1704.

The first step in a court's analysis of a claim involving alleged monopolization is a definition of the relevant markets. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268 (2d Cir. 1979), *citing United States v.*

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[3] The plaintiff, at oral argument, conceded that the relevant market here is one which is much narrower than the market it alleged when it originally brought this lawsuit. Both sides agree, for purposes of this motion, that the market defined by D & H, which Conrail is alleged to have monopolized, and attempted to monopolize, is the aforementioned market.

E.I. du Pont [de] Nemours & Co., 351 U.S. 377, 391-93, 351 S.Ct. 994, 1005-06 (1956).[4]

A determination of the relevant market in an antitrust claim requires inquiry into both the nature of the product, *E.I. du Pont*, 351 U.S. at 391, 351 S.Ct. at 1004-05, and the geographical area in which the alleged illegal conduct took place. *Grinnell*, 384 U.S. at 575-76, 86 S.Ct. at 1706. *See also Oahu Gas Service Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 364 (9th Cir. 1988).

For purposes of this motion, both parties agreed, at oral argument, that the relevant market is the transportation of newsprint from Eastern Canada to the mid-Atlantic states. As a result of this narrow market definition, many of the claims against Conrail in D & H's complaint, including claims pertaining to Conrail's reciprocal switching rates, have been abandoned and are no longer an issue before this court.

While Conrail alleges that it does not possess monopoly power in the relevant market, since this court finds that the second element of an antitrust violation has not been proven by the plaintiff, the court will presume, for purposes of this motion, that Conrail does have monopoly power in this market.

The mere existence of monopoly power is not a violation of the Sherman Act. Rather, "the offense of monopolization under Section 2 of the Sherman Act requires proof of monopoly power . . . plus conduct designed to maintain or enhance that power improperly." *Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 373 (7th Cir. 1986), *citing United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04

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[4] The plaintiff bears the burden of establishing the relevant market in a monopolization claim. *Walker Process Equipment Co. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-78, 86 S.Ct. 347, 350-51 (1965), *Neumann v. Reinforced Earth Co.*, 786 F.2d 429 (D.C. Cir. 1986).

(1966), *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 457 U.S. 585, 596 n.19, 105 S.Ct. 2847, 2854. (1985)[5]

In determining whether a plaintiff has satisfied the second *Grinnell* requirement, the *Aspen* court held that proof of a general intent to monopolize was necessary to establish a Section 2 Sherman Act claim. *Id.* 457 U.S. at 602, 105 S.Ct. at 2857. In proving this intent on the part of Conrail, the plaintiff offers a memorandum of John H. Williams, Conrail's former assistant vice-president in charge of strategic analysis and planning. In this memo, written to Richard B. Hasselman, Conrail's Senior vice-president for operations, Williams said, concerning D & H, "I'm for a monopoly in total! . . . So lets Conrail take and rationalize the entire D & H."

This is relatively clear proof of Conrail's monopolistic intent. However, "the desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws". *Ocean State Physicians Health Plan, Inc. v. Blue Cross* 883 F.2d 1101, 1113 (1st Cir. 1989).

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[5] *See* Von Kalinowski, *Antitrust Laws and Trade Regulation,* vol. 3, § 8.02(4) (Bender 1989), where it is noted that:

> Under Section 2, actual monopolization consists of the power to control prices or exclude competition, coupled with "the purpose or intent to exercise that power for anticompetitive or exclusionary purposes."

See also Sullivan, *Antitrust,* § 36 (West 1976), where, in differentiating between permissible and exclusionary conduct on the part of an organization, it is stated that

> First, [the exclusionary conduct test] should discriminate between conduct which is harmful in some economic sense, and conduct which is not; second, it ought to discriminate between alternative courses of action in the marketplace in a manner which would be meaningful to an actor there, so that those whose conduct the law would shape can be guided in meaningful ways; third, it should not ban conduct which is no more than the normal, rational response of a business manager seeking to maximize profits, sales, or revenues.

A monopolist is not prohibited from engaging in business transactions merely because it is a monopolist. Thus, in *U.S. Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988), this circuit recently upheld the following jury instruction:

> A monopolist has the same right to compete as any other company. Under the antitrust laws, a monopolist is encouraged to compete vigorously with its competitors and to remain responsive to the needs and demands of its customers.

Id. at 1361. *See also Ocean State*, where the court noted that "Section 2 does not prohibit competition on the part of a monopoly. To the contrary, the primary purpose of the antitrust laws is to encourage competition." *Id.*, 883 F.2d at 1110 (citations omitted).

Nor is a monopolist required to engage in business transactions without taking into account how such transactions would affect the monopolist's business. Accordingly, in *Aspen* the Supreme Court approved the following jury instruction:

> a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal. In other words, if there were legitimate business reasons for the refusal, than the defendant, even if he is found to possess monopoly power in the relevant market, has not violated the law.

Id., 457 U.S. at 597, 105 S.Ct. 2854.

Thus, the issue before this court is whether Conrail's make or buy policy was a legitimate business practice, and therefore not violative of Section 2, or whether this program was exclusionary and therefore impermissible under the Act. Accordingly, an examination of this policy is appropriate.

(b) The make or buy rail-rate policy.

In 1982, Conrail instituted what it refers to as its make or buy rail-rate policy. Under this program, Conrail informed D & H that it would concur in rates proposed by D & H over short haul routes as long as Conrail received the same contribution [6] that it would receive if Conrail carried the freight by itself along one of it's own long haul routes.

Conrail offered the following example as illustrative of this policy: A Canadian rail carrier sought to offer a rate to a shipper in Quebec, Canada concerning the transportation of paper from Quebec to Lancaster, Pennsylvania, a point served only by Conrail. This freight could be transported over several possible through routes. One route would be from the shipper's location in Quebec over the Canadian carrier, to D & H at Rouses Point, New York, for interchange with Conrail at Harrisburg, Pennsylvania, and for final delivery by Conrail to the consignee at Lancaster. Alternatively, the paper could be delivered from its place of origin to Conrail's station in Quebec, where Conrail could then directly carry the freight to the consignee in Lancaster, Pennsylvania.

The Canadian carrier contacted both D & H and Conrail, and sought to establish an equal joint rate for each route. Conrail did not concur in the joint rate proposal concerning the route involving D & H, because in the D & H/ Conrail route, Conrail would have received less contribution than it would had Conrail carried the freight by itself.

D & H alleges that Conrail's refusal to concur in joint rates such as the aforementioned is exclusionary. The plaintiff argues that since it would cost Conrail less money to participate in rates with D & H, rather than

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[6] Contribution is the revenue that a carrier receives for moving freight over part of a route, less the costs associated with that movement.

for hauls involving Conrail alone, Conrail's refusal to concur is anticompetitive conduct. This contention is incorrect. Of course, it would cost Conrail more money to haul the paper from Quebec to Lancaster than it would had Conrail chosen to transport it only from Harrisburg to Lancaster. However, the contribution Conrail would have received for hauling the paper from Harrisburg would have been significantly less than the contribution it would have obtained for transporting the paper from Quebec to Lancaster.[7] Conrail's profits are directly tied to the contribution it receives, so as the overall contribution it collects increases, so does Conrail's potential for profits. It therefore would have been unprofitable for Conrail to concur in joint rates with D & H in situations where it would have received more contribution if Conrail, alone, carried the freight. A monopolist is not required to engage in practices which are less profitable than other, legitimate practices. *U.S. Football League*, 842 F.2d at 1361.[8]

The plaintiff claims that Conrail's make or buy policy is the "exact counterpart" of the conduct of the defendant in *Aspen*, where the defendant's conduct was found to violate section 2 of the Sherman Act. However, this is not the case. In *Aspen*, the Court found that it would be logical for a jury to conclude that:

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[7] For example, if it cost Conrail $20,000 to carry paper from Quebec to Lancaster, and it was offered $30,000 to transport the paper by a Canadian company, Conrail would receive a contribution (or profit) of $10,000. Had it cost Conrail $750 to carry the paper from Harrisburg to Lancaster in a joint rate proposal with D & H, and it was paid $2,000, it would have only received a $1,250 contribution.

[8] In *U.S. Football League*, the second circuit approved a jury instruction which stated, *inter alia*, that:

> a monopolist is under no duty to help or aid its competitors *and is free to set as its legitimate goal the maximization of its own profits* so long as it does not exercise its [monopoly] power to maintain that power (emphasis added).

> [the defendant] Ski Co. elected to forgo . . . short run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor.

Id. 472 U.S. at 608, 105 S.Ct. at 2860. The Court also found that the defendant "was willing to sacrifice short run benefits and consumer goodwill" in order to harm its competitor in the long run. *Id.* at 610-11, 105 S.Ct. at 2861. In the instant case, D & H has failed to proffer evidence of a similar sacrifice on the part of Conrail. The plaintiff has not provided this court with one instance where Conrail refused to concur in join rates with D & H where concurrence with D & H would have been more profitable for Conrail than non-concurrence.

Thus, D & H has failed to show how this make or buy policy, as implemented by the defendant, was anything but a valid business policy of Conrail, and therefore not violative of Section 2.

Having analyzed Conrail's rail-rate making policy, the court must next consider whether it is appropriate, on a motion for summary judgment, to conclude as a matter of law here that Conrail's make or buy policy is a legitimate business policy and therefore not violative of Section 2.

(c) The appropriateness of summary judgment.

In *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983), the plaintiff appealed a district court's granting of summary judgment in favor of the defendant in a suit based on both the Sherman Antitrust Act and the Clayton Act, § 3, 15 U.S.C. § 14. In upholding the district court's granting of summary judgment, the court stated:

> a decision to extend or withhold credit which is based upon valid business considerations does not

> violate § 2(a) [of the Clayton Act], and since the only record evidence establishes that [the defendant's] refusal to extend credit to [the plaintiff] . . . was based upon valid considerations, it was not error for the district court to grant summary judgment on this issue.

Id. at 1326. Similarly, in *Bell v. Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988), while finding a triable issue of fact in the Section 2 case that was before it, the fifth circuit noted:

> Defendants can offer business justifications for the refusal to deal. If the justifications are supported by legitimate business concerns . . . then the district court may decide as a matter of law that the defendant's refusal " 'was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.' " *Eastman Kodak Co. v. Southern Photo Materials Co.* 273 U.S. 359, 375, 47 S.Ct. 400, 404 (1927).

Thus, it is appropriate for this court, on a motion for summary judgment, to find as a matter of law that a defendant's business practices are legitimate and not violative of the Sherman Act. Clearly, profit maximization is a legitimate business goal. The defendant's make or buy policy's sole goal is profit maximization. Therefore, this court finds that the defendant has not engaged in exclusionary conduct violative of Section 2 of the Sherman Antitrust Act.

(d) The essential facilities doctrine.

In addition to a traditional Section 2 analysis, the plaintiff argues that the defendant is not entitled to summary judgment on its monopolization claim because of the "essential facilities" doctrine. This doctrine is based on the theory that a monopolist in control of a scarce or essential facility must give competitors reason-

able access to the facility.[9] Since, as discussed below, the plaintiff has failed to prove one of the elements of this doctrine, it is precluded from invoking the same.

There are four elements necessary to establish liability under the essential facilities doctrine:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983).

Assuming, *arguendo*, that the relevant essential facility in this case is defendant's tracks, the defendant must prove that it could not duplicate this facility, and that Conrail refused D & H permission to use it.

Here, there can be no dispute that a physical duplication of defendant's lines would be an impractical and unreasonable project to undertake. Thus, this facility could only have been "duplicated" by Conrail allowing D & H the use of Conrail's tracks. An absolute refusal to allow a competitor the use of its facilities is not required in order to satisfy the third element of the essential facilities doctrine. Rather, if a company's offer to allow its competitor to use its facilities is unreasonable, then such an offer can be viewed as a refusal to deal at all. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.* 665 F.Supp 1493, 1534 (S.D.Fla. 1987), *aff'd.* 880 F.2d 297 (11th Cir. 1989).

Here, unlike in *Consolidated Gas*, this court has determined that defendant's make or buy policy is a reason-

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[9] *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 856 (6th Cir. 1979), *citing United States v. Terminal Railroad Assoc.*, 224 U.S. 383 (1912).

able, profit maximizing practice. The defendant was, at all times, willing to allow D & H the use of Conrail's tracks, via joint rates with D & H, as long as the overall contribution Conrail received for the job would have been no less than the amount it would receive for non-participation.

In *Laurel Sand & Gravel, Inc. v. CSX Transp. Inc.*, 704 F.Supp. 1309 (D.Md. 1989), the plaintiff brought an action claiming, *inter alia*, that defendant's joint rate proposal was unreasonable and therefore violative of the Sherman Act. In *Laurel*, as here, the court found the defendant's proposal to be reasonable. *Id.* at 1324. As a result, the *Laurel* court ruled that the plaintiff had failed to prove the third element of the essential facilities doctrine, and accordingly granted defendant's motion for summary judgment. *Id.* at 1324-25.

In the instant case, the plaintiff has failed to prove that Conrail denied D & H the use of Conrail's tracks. Therefore, the plaintiff cannot prevail in its antitrust claim utilizing the essential facilities doctrine.

2. The attempt to monopolize claim.

The second count in plaintiff's complaint alleges that the defendant has attempted to monopolize the market consisting of the transportation of newsprint from Eastern Canada to the mid-Atlantic states. The elements for an attempt to monopolize claim were recently set forth in *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987), *cert. denied*, 482 U.S. 914 (1987). The Second Circuit stated that:

> [l]iability for attempted monopolization rests on proof of three elements: (1) anti-competitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a "dangerous probability" that the attempt will succeed.

Id. at 790 (citations omitted).

In *Neumann v. Reinforced Earth Co.*, 786 F.2d 424 (D.C.Cir. 1986), the court discussed at some length the general scope and philosophy behind a violation of Section 2 of the Sherman Act concerning an attempt by a company to monopolize a market. The court held:

> When the law speaks of attempts to monopolize, it generally refers to predation. Predation involves the deliberate seeking of monopoly power by means other than superior efficiency, by means that would not be employed in the normal course of competition. Thus, predation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

Id. at 427.

In addition to defendant's make or buy policy, which this court has already found to be a legitimate practice on the part of Conrail, the plaintiff refers to three specific actions taken by Conrail which D & H alleges proves Conrail's specific intent to monopolize the relevant market.

One of these acts was the installation of a fueling facility at Rockeville, Pennsylvania. The plaintiff alleges that Conrail persistently delayed D & H's trains while it refueled its own trains, and that if Conrail was refueling one of its trains, it would send the waiting D & H train on a different, longer route, causing additional delays and expense to D & H. Clearly, the installation of a fueling facility is not exclusionary conduct *per se*. In re-

sponse to defendant's motion, the plaintiff has failed to proffer any evidence proving that this facility was installed with the specific intent of monopolizing the market concerning the transportation of newsprint from Eastern Canada to the mid-Atlantic states. The second anti-competitive act alleged by plaintiff was Conrail's ruling permitting its dispatchers to prevent engineers, including those from D & H, from continuing travel along Conrail's tracks, upon a determination by Conrail that the engineer in question had worked too many hours. This policy was adopted by Conrail to improve safety over its railways. While there is no dispute that Conrail did, in fact, adopt such a policy, as with Conrail's conduct concerning the installation of the fueling facility, the plaintiff has not proffered any evidence which links this practice on the part of Conrail to the defendant's attempt to monopolize the relevant market. Additionally, there is no evidence before this court that any newsprint traffic from Eastern Canada moved over either of these areas, let alone that such traffic was delayed or diverted by the fueling facility or Conrail's application of the "hours of service" rule.

Finally, the plaintiff claims that Conrail arbitrarily refused to permit D & H to adjust its trains at facilities in Allentown, Pennsylvania. Once again, however, the plaintiff has proffered no proof which links this refusal to the plaintiff's claim that Conrail has attempted to monopolize the market concerning the transportation of newsprint from Eastern Canada to the mid-Atlantic states. In fact, the plaintiff, itself, in its memorandum opposing defendant's motion for summary judgment, claims that this conduct resulted in the loss to D & H of its ferro-manganese ore traffic, but is silent concerning a loss of any newsprint traffic. Thus, this evidence, too, is insufficient to prove anti-competitive conduct on the part of the defendant sufficient to withstand defendant's motion for summary judgment concerning plaintiff's attempt to monopolize claim.

Conclusion

The plaintiff has failed to prove that the defendant's make or buy rail-rate policy was anything other than a legitimate, profit-maximizing program on the part of the defendant. Therefore, defendant's conduct did not violate the Sherman Antitrust Act, under either traditional Section 2 analysis or under the essential facilities doctrine.

Additionally, the plaintiff has failed to prove that the defendant engaged in any exclusionary acts with the specific intent of monopolizing the market consisting of the transportation of newsprint from Eastern Canada to the mid-Atlantic states. Thus, the plaintiff has not proven its attempt to monopolize claim. Accordingly, this court grants defendant's motion for summary judgment on both counts of plaintiff's complaint.

IT IS SO ORDERED.

Dated: November 15, 1989
Syracuse, New York

/s/ Neal P. McCurn
NEAL P. MCCURN
Chief
U.S. District Judge

UNITED STATES DISTRICT COURT
N.D. NEW YORK

No. 86-CV-810

DELAWARE AND HUDSON RAILWAY COMPANY,
Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

March 2, 1987

Dewey Ballantine Bushby Palmer & Wood, New York City, and Sanford M. Litvak, of counsel, George H. Kleinberger, Delaware and Hudson Ry. Co., Watervliet, N.Y., Kinga M. LaChapelle, of counsel, for plaintiff.

McNamee Lochner Titus & Williams, Albany, N.Y., and Scott A. Barbour, of counsel, Pepper Hamilton & Scheetz, Philadelphia, Pa., Laurence Z. Sheikman, Stephen J. Cipolla, Sean P. Wajert, of counsel, for defendant.

MEMORANDUM-DECISION AND ORDER

McCURN, District Judge.

This treble-damage antitrust action is brought pursuant to 15 U.S.C. § 15. The plaintiff, Delaware and Hudson Railway Company ("D & H"), asserts that it has been injured by actions of the defendant, Consolidated Railway Company ("Conrail"), in contravention

of Section two of the Sherman Act, 15 U.S.C. § 2, which forbids a person or company to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." *Id.* Pending before the court is a motion by Conrail to dismiss the complaint pursuant to F.R.C.P. 12(b)(6). Accordingly, all well-pleaded allegations in the complaint are accepted as true and provide the basis for this court's analysis and decision. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

I. BACKGROUND

D & H is a Delaware corporation which provides rail transportation services throughout the Mid-Atlantic region. Conrail is a Pennsylvania corporation organized pursuant to the Regional Rail Reorganization Act of 1973, Pub.L. No. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. § 741). Conrail was organized by Congress because of the massive collapse of regional railroads in the 1970's. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). It provides rail transportation services to the Northeast and the Midwest.

D & H and Conrail are competitors. Nevertheless, because of the nature of the railroad business they must jointly participate in the use of rail facilities. No railroad is capable of providing service to every shipper location in the United States. In order to provide national service, railroads are required to participate in "through routes," which are business arrangements made between two or more railroads where they agree to move freight in continuous carriage between the origin on one railroad and the final destination on another. Railroads also operate "single line routes". On a single line route, the entire railway from origin to destination belongs exclusively to one railroad. Larger railroads, such as Conrail, own many single line routes. The smaller railroads, such as D & H, often must interconnect with the larger railroads

by the use of through routes to provide service to major metropolitan areas.

Through routes and single line routes may serve the same corridor.[1] Conrail owns a single line route between Chicago and Albany, while Conrail and D & H participate in a through route between those two cities. The through route consists of carriage on Conrail lines between Chicago and Buffalo, and carriage on D & H lines between Buffalo and Albany. There may also be more than one through route servicing the same corridor. Where two or more routes serve the same corridor, they are in direct competition for shippers' business in the corridor.

An important factor in competition is the price, or rate, charged to the shipper. There are three basic rates of concern in this action. A "single line rate" is the rate charged by the operator of a single line route. A "combination rate" is the aggregate of two or more rates on a through route. For example, on the Chicago-Albany through route described above, the combination rate could be the sum of the Conrail Chicago-Buffalo rate and the D & H Buffalo-Albany rate. Finally, a "joint rate" is a single rate charged to a shipper for transport on a through route. The revenues derived from joint rates are divided between the carriers participating in the through route pursuant to contract. On the Albany-Chicago route described above, for example, a single rate could be charged to shippers. The revenues derived from charging that rate would be divided between Conrail and D & H pursuant to a predetermined formula.

Regulation is also a factor in competition. Prior to the mid and late 1970's, price competition between rail-

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[1] Corridor is used here as a shorthand notation for origin-destination combination. For example, a corridor exists between Albany and Chicago.

roads was considered to be unhealthy for the railroad industry and the consumer. Therefore, the establishment and regulation of rates was the province of the Interstate Commerce Commission ("ICC"). The ICC frequently encouraged or compelled the railroads to establish a system of "equalized joint rates". Under that system, the same rate applied equally over all single and joint routes serving a particular corridor.[2] In addition, a joint rate could not be changed or cancelled except with the concurrence of all carriers who participated in the relevant joint route, or after a lengthy proceeding before the ICC. The ICC also controlled other aspects of the railroad industry, including the imposition of reciprocal switching charges.[3]

The passage of the Railroad Revitalization and Regulatory Reform Act of 1976, Publ.L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Publ.L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), however, changed the face of railroad regulation by the ICC. In the preamble to the Staggers Act, Congress declared it to be the national policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101a(1). Among other changes intended to substitute marketplace forces for regulation, the Staggers Act stripped the ICC of all jurisdiction to review rates and charges except in limited circumstances where they fall above or below certain jurisdictional thresholds. *See* 49 U.S.C. §§ 10701a and 10709. In addition, a carrier is now permitted to cancel a joint rate subject to certain exceptions. *See* 49 U.S.C. § 10705a(c).

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[2] Combination rates were not affected.

[3] Reciprocal switching is a service whereby one railroad will transport freight cars of another railroad for access to a point served only by the former railroad. The company providing the service does so for a per car fee.

II. COMPLAINT

Against the above background, D & H asserts that Conrail has violated Section two of the Sherman Act to the detriment of D & H. D & H claims that prior to Conrail's unlawful conduct, D & H provided an effective competitive alternative to Conrail service throughout many corridors. Conrail's conduct has allegedly interfered with that competition.

A. *Count I*

D & H first claims that Conrail has monopolized the railroad industry in the Eastern Territory.[4] Paragraph eleven of the complaint asserts, in part:

> In the Northeast, Conrail is the only railroad serving more than 2,600 stations with some 61,000 customers. Out of all the railroad stations in Connecticut and New Jersey, for example, Conrail exclusively serves over 75% and 80% respectively. In the Philadelphia and Northern New Jersey areas, Conrail exclusively serves over 98% of the railroad served stations. Any shipper wishing to ship from these captive stations must use Conrail until an open interchange[5] is reached. Conversely, any shipper wishing to ship to these captive stations must use Conrail from the last open interchange to the stations served exclusively by Conrail. Any other railroad wishing to transport freight originating at or destined to Conrail's captive stations must deal with Conrail.

Conrail has allegedly exercised monopoly power, unlawfully monopolizing the Eastern Territory, through a

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[4] The Eastern Territory is a ratemaking territory comprised generally of the New England, Middle Atlantic and Midwestern states to the east of the Mississippi River and the north of (and including) Norfolk and Western Railway's Norfolk to Cincinnati line.

[5] An open interchange is a junction between two or more railroads where the railroads maintain through routes.

series of acts decribed in paragraph fifteen of the complaint. D & H maintains that these acts were designed to single out routes in a corridor which were most profitable to Conrail, and force out the other routes in competition with Conrail's profitable routes. It is urged that Conrail selectively cancelled participation in joint rates on through routes effective July 25, 1981. When the joint rates were cancelled, the through routes became priced at a combination rate. Because combination rates are apparently higher than joint rates, these through routes, in which smaller railroads such as D & H participated, became disadvantaged competitively. Similar cancellations are claimed to have occurred in October of 1982 and July of 1984. D & H contends that Conrail has also refused to negotiate on the establishment of new joint rates which would be responsive to price competition and market conditions. Further, D & H asserts that Conrail has increased reciprocal switching charges to D & H to make the use of D & H lines prohibitively expensive to shippers, and that Conrail has engaged in other conduct designed to foreclose competition and monopolize the relevant market.

B. *Count II*

Count II of the complaint avers that Conrail has "attempted" to monopolize the relevant market in contravention of Section two of the Sherman Act. Paragraph twenty-three of the complaint lists several acts by Conrail which, in combination with those acts listed in Count I and discussed above, allegedly demonstrate Conrail's attempt to monopolize. These acts generally involve Conrail's use of its facilities in such a manner as to delay and impede the operation of D & H trains. For example, paragraph 23(a) provides that Conrail refuels its own trains on a main line used jointly by Conrail and D & H. The refueling purportedly delays priority trains of D & H.

C. *Requested Relief*

The complaint demands as relief treble damages pursuant to 15 U.S.C. § 15. The complaint does not provide the basis for damage calculation. Counsel for D & H did explain at oral argument, however, that D & H is seeking damages based on profits allegedly lost as a consequence of Conrail's actions. Trans. at 52-53. D & H also demands injunctive relief prohibiting Conrail from partaking in further anticompetitive conduct and restoring joint rates, among other things, cancelled by Conrail. Finally, plaintiff D & H seeks costs and attorneys' fees associated with the prosecution of this action.

III. THE MOTION TO DISMISS

Although the motion papers are styled to request dismissal pursuant to F.R.C.P. 12(b)(6), counsel for Conrail has stated at oral argument that defendant does not seek a complete dismissal of this action. Trans. at 4-5. Rather, it claims that D & H cannot obtain relief in either Counts I or II with respect to actions taken by Conrail prior to July 15, 1982, because such relief is barred by the four-year statute of limitations contained in 15 U.S.C. § 15b. Conrail claims further that the acts described in Count II do not constitute attempts to monopolize, but rather violations of state contract or landlord/tenant law. Additionally, Conrail contends that granting the relief requested would unlawfully interfere with the power of the ICC. Finally, Conrail argues that D & H's claims unaffected by the above should be stayed in order to receive the view of the ICC pursuant to the doctrine of "preliminary exclusive" or "primary" jurisdiction.

IV. DISCUSSION

Despite Conrail's use of the primary jurisdiction doctrine to dispose of D & H claims not eliminated by other arguments, the court considers the primary jurisdiction

issue to be the most comprehensive and important issue presented here. Accordingly, that issue will be considered first.

A. *Primary Jurisdiction*

Conrail must of course recognize that by asserting the doctrine of primary jurisdiction, it does not follow that this court is without jurisdiction to hear the antitrust claims of D & H. In a long line of cases, the Supreme Court has repeatedly rejected the notion that regulated industries are exempt from the antitrust laws. *See e.g. Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456, 65 S.Ct. 716, 725, 89 L.Ed. 1051 (1945). This is particularly true since the passage of the Staggers Act, which seeks to free rail carriers from regulatory restraint. *See e.g. Cleveland-Cliffs Iron Co. v. I.C.C.*, 664 F.2d 568, 588 (6th Cir. 1981). The deregulation contained in the Staggers Act exposed rail carriers to all kinds of market forces, including the antitrust laws. *Transkentucky Trans. R.R. v. Louisville & N.R.R.*, 581 F.Supp. 759, 764-65 (E.D.Ky.1983).

The doctrine of primary jurisdiction is applicable, however, where the courts and the ICC have concurrent jurisdiction over a dispute involving issues "beyond the conventional experience of judges." *Engelhardt v. Consolidated Rail Corp.*, 756 F.2d 1368, 1369 (2d Cir.1985). "The doctrine comes into play when a claim is cognizable in a court but adjudication of the claim 'requires the resolution of issues which, under a regulatory scheme have been placed within the special competence of an administrative body.'" *Hansen v. Norfolk & W. Ry.*, 689 F.2d 707, 710 (7th Cir. 1982) (quoting *United States v. Western Pacific R.R.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956)). In such a case, the court will stay its hand until the agency has applied its expertise to the salient questions. *Engelhardt*, 756 F.2d at 1369.

1. *Application of the Doctrine by other Courts*

Because there is no fixed formula for the application of the doctrine, a case-by-case factual analysis is required. *Engelhardt v. Consolidated Rail Corp.*, 594 F.Supp. 1157, 1164 (N.D.N.Y.1984, *aff'd*, 756 F.2d 1368 (2d Cir.1985). A survey of the doctrine's application by other courts is instructive. In some cases the courts deferred judicial action in order to obtain a necessary initial determination from an agency so as to avoid the possibility of inconsistent decisions. In *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed.2d 408 (1932), and *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed 576 (1952), the plaintiffs challenged price setting agreements between shipping companies as violative of the antitrust laws. If such agreements had been approved by the Federal Maritime Commission, however, they would have been exempt from the operation of the antitrust laws. Rather than risk the possibility of a later inconsistent determination from the Commission, the *Cunard* and *Far East* Courts deferred judicial consideration until the Commission considered the agreements in question. A similar deferral occurred in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973). In *Ricci*, the plaintiff asserted that the defendants had acted pursuant to an unlawful conspiracy, and thereby injured his brokerage business. The Court determined, however, that if the defendants' conduct was approved by the Commodity Exchange Commission there may have been immunity from the application of antitrust laws. *Id.* at 298-306, 93 S.Ct. at 579-582. The Court opined:

> We also think it very likely that a prior agency adjudication of this dispute will be a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit, a matter that seems to depend in the first instance on whether

> the transfer of Ricci's membership was in violation of the Act for failure to follow Exchange rules. That issue in turn appears to pose issues of fact and questions about the scope, meaning, and significance of Exchange membership rules. These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case. (citations omitted)

Id. at 305, 93 S.Ct. at 582. Moreover, the Second Circuit subscribes to the use of the primary jurisdiction doctrine to obtain necessary preliminary decisions from agencies. In *Engelhardt*, three employees of Conrail, formerly employed by the New Haven Railroad (which became part of Penn Central and then Conrail), brought suit pursuant to 49 U.S.C. § 11347 alleging violation of orders promulgated by the ICC in connection with the creation of the Penn Central system. The court thought it proper to have the ICC interpret its own orders:

> We simply cannot say with any certainty whether the I.C.C. orders relating to the creation of the Penn Central System were violated by the seniority scheme underlying this dispute. That question, from which flows the resolution of this claim, properly lies within the discretion of the I.C.C.

Id. at 1369.

Courts have also deferred to administrative proceedings where such proceeding would narrow and define complex legal and factual controversies. In *Hansen*, the plaintiff, a trucking company, charged defendants, various trucking and rail transportation companies, with violating the tariff requirements of Section 10761(a) of the Interstate Commerce Act, Sections one and two of the Sherman Act, and Section two of the Clayton Act. Central to both the interstate commerce and antitrust

claims was plaintiff's allegation that defendants conspired to control the provision of piggyback service [6] and to thereby circumvent applicable ICC tariffs. *Hansen*, 689 F.2d at 709. The court stayed both the interstate commerce and the antitrust claims pending proceedings by the ICC. In so doing, the court noted:

> Piggyback service . . . poses difficult transportation policy problems involving the appropriate allocation of services between rail and motor carriers. Because the plaintiff's complaint raises such difficult problems, judicial consideration of this cause must await proceedings by the specialized agency created by Congress to deal with transportation policy—the I.C.C.

Id. at 711. Even though the ICC had no jurisdiction over the antitrust claims, the court also stayed such claims pending ICC action on the claims within its jurisdiction. *Id.* at 713. The court determined that the ICC consideration may "narrow or refine the factual issues relating to the plaintiff's antitrust claims." *Id.* Moreover, the court determined that the complaint raised issues regarding the proper relationship between the Interstate Commerce Act and the antitrust laws, and opined that "an I.C.C. determination of whether the Commerce Act has been violated will be of immense aid to the court hearing of the plaintiff's antitrust claims." *Id.*

In *GTE Sprint Communications Corp. v. Downey*, 628 F.Supp. 193 (D.Conn.1986), the plaintiffs sought to enjoin enforcement of a Connecticut state law regulating intrastate communications. The principal thrust of the plaintiffs' argument was that portions of the law intruded into an area of telecommunications preempted by

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[6] Piggyback service involves railroad carriage of containers or vehicles, such as trucks, suitable for immediate transfer to another mode of transportation.

the Communications Act of 1934, 47 U.S.C. § 1 *et seq.*, and exclusively regulated by the Federal Communications Commission ("FCC"). The court referred the question of preemption to the FCC under the primary jurisdiction doctrine. In so doing, the court noted that the resolution of the preemption issue required extensive findings of complicated and controverted technical facts beyond the conventional experience of judges. *GTE Sprint*, 628 F.Supp. at 195-96.

2. *Application of the Doctrine to the Present Facts*

Conrail asserts that the ICC can and should consider D & H's claims at the outset. Conrail recognizes that these antitrust claims do not fall within the jurisdiction of the ICC. Although the ICC may consider antitrust principles in its determinations, the agency lacks authority to enforce the antitrust laws or even determine if they have been violated. *Transkentucky*, 581 F. Supp. at 767, (citing *McKlean Trucking Co. v. United States*, 321 U.S. 67, 79, 64 S.Ct. 370, 376, 88 L.Ed. 544 (1944)). Conrail asserts, however, that the individual instances of Conrail's allegedly unlawful conduct, such as the 1982 joint rate cancellations, can be considered by the ICC, and that such consideration should precede further judicial action.

There can be no dispute that the ICC can consider whether many, if not all, of the alleged acts of Conrail violate the Interstate Commerce Act and the national rail policy enunciated therein. 49 U.S.C. §§ 10705 and 11103 provide the ICC with the power to prescribe "in the public interest" joint rates and reciprocal switching arrangements. Pursuant to that power, the ICC has promulgated rules, effective December 6, 1985, to govern the handling of the following competitive access issues: cancellation of through routes and joint rates; and prescription of through routes, through rates, and reciprocal switching. *See* 49 C.F.R. § 1144. Accordingly, the ICC can suspend, investigate and/or negate a through route

or joint rate cancellation as well as a modification to a switching arrangement where it finds that such modifications or cancellations are contrary to the competition policies of 49 U.S.C. § 10101a.[7] *See* 49 C.F.R. §§ 1144.3, 1144.4 & 1144.5.

The complaint asserts that Conrail's acts of joint rate cancellations and increased reciprocal switching charges *in the aggregate* demonstrate Conrail's monopolization or attempted monopolization of the relevant market, however. The narrow issue facing this court, then, is whether the court should postpone considering Conrail's acts in the aggregate until the ICC has had a chance to consider them individually.

Unlike the facts presented in *Cunard, Far East, Ricci,* and *Engelhardt,* the court need not obtain an initial de-

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[7] 49 U.S.C. § 10101a provides, in pertinent part:

In regulating the railroad industry, it it the policy of the United States Government—

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> * * * *
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> * * * *
>
> (13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

termination of an administrative agency to guide the application of the substantive law. It is conceivable that every individual act of Conrail's be approved by the ICC and yet in the aggregate violate the antitrust laws as an unlawful pattern of conduct designed to destroy competitors such as D & H. "The mere fact of . . . authorization of rates or contracts or other conduct by a regulatory agency does not obviate the possibility that such rates, contracts or conduct, although authorized for one purpose, may be used for another unlawful purpose." *Transkentucky*, 581 F.Supp. at 767-68.

The only justification for deferral, therefore, is to permit the ICC to narrow and define complex legal and factual controversies. There are indeed complex legal and factual controversies presented here. Conrail's alleged conduct, for example, must be analyzed in light of changes in national rail regulatory policy. Furthermore, Conrail's actions involve business relationships, terminology, and a geographic expanse with which this court is presently unfamiliar. In the final analysis, however, this court has the responsibility to find the facts and apply them to the law of antitrust. While efforts by the ICC may be helpful to the court in carrying out that responsibility, that aid is overshadowed by other considerations.

First, the aid provided by ICC consideration may be minimal. The ICC could, of course, function as a fact finder and summarize the facts that may be relevant to this antitrust action. The parties agree here, however, that as to liability this action is likely to be appropriately disposed of by summary judgment. Trans. at 64-65. The court is confident that it can marshal the facts as adequately from materials submitted on such motions as from ICC documents. Moreover, any legal consideration provided by the ICC may not be suitable to the antitrust analysis. Conrail's Reply Brief includes a copy of Interstate Commerce Commission Decision Number 38676 to

demonstrate the type of consideration the ICC could provide D & H's claims. *See* Conrail Reply Memorandum at Appendix A. A brief examination of the decision reveals that it provides little that is pertinent to a traditional antitrust analysis.[8] Second, deferral of this case, which would essentially require the plaintiff to proceed before the ICC, would deprive the plaintiff of his choice of forum as well as cause substantial delay which could significantly harm the plaintiff's business. Consequently, under the discretion inherent in the doctrine of primary jurisdiction, *see GTE Sprint*, 628 F.Supp. at 195, the court denies Conrail's motion to stay or dismiss the plaintiff's complaint pursuant to such doctrine. Having denied this motion, the court must consider the other arguments advanced by Conrail.

B. *Attempt to Monopolize*

Conrail argues that much of the conduct alleged in Count II concerns alleged disputes between Conrail as "landlord" and D & H as "tenant". Conrail asserts that

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[8] The complaint alleges that Conrail has monopolized or attempted to monopolize the relevant rail market. The law applicable to such allegations is clear. In order to prove unlawful monopolization, the plaintiff must demonstrate the defendant's monopoly power and its willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). To prove an attempt to monopolize, the plaintiff must show that the defendant employed methods which, though falling short of monopolization, create a dangerous probability of it with the specific intent to destroy competition or build a monopoly. *Buffalo Courier-Exp. v. Buffalo Evening News*, 601 F.2d 48, 54 (2d Cir.1979). The ICC analysis in Decision Number 38676 concentrates primarily on evidence related to transit time, mileage, and fuel consumption associated with joint rate cancellations. Such information would appear, at least at this juncture, to have little impact on the application of the law summarized above.

such conduct cannot be anticompetitive because it is not derived from Conrail's power in the market, or its size. *See* Conrail's Brief at 38-40. This argument has no merit on this motion to dismiss. It is of no import to the antitrust analysis whether the parties stand in relation as landlord and tenant or as other contractors so long as it is appropriately alleged that the defendant's actions were undertaken with the purpose to create or maintain a monopoly. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *see also supra* note 8. Here, Count II adequately alleges that these actions were undertaken to drive out D & H as a competitor. Moreover, whether or not Conrail's conduct was derived from its market power is a question of fact that should not be addressed on a motion to dismiss.

C. *Statute of Limitations*

Under Section 4B of the Clayton Act, 15 U.S.C. § 15b, any action to recover treble damages in private antitrust must be commenced within four years after the cause of action has accrued. Conrail asserts that certain portions of D & H's complaint[9] should be dismissed because they allege acts occurring more than four years prior to the commencement of this action. For example, Conrail asserts that the allegations of subparagraphs 15(a) and 15(b) of the complaint, which concern joint rate cancellations effective July 25, 1981, nearly five years before the action was commenced, should be dismissed as time-barred. The question presented is when did the causes of action associated with these pre-limitations acts accrue. Conrail argues that they accrued on the date of the relevant acts. D & H claims, on the other hand, that accrual cannot be fixed at such dates because monopolization constitutes a continuing violation of the antitrust laws.

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[9] Specifically, paragraphs 15(a), (b), (e), and (g).

D & H's implication that monopolization is always a continuing violation cannot be accepted. First, it is inconsistent with the basic understanding of a monopolization claim. Monopolization involves (1) monopoly power and (2) acts that demonstrate unlawful maintenance or acquisition of that power. *See supra* note 8. Consequently, the *acts* of unlawful maintenance or acquisition have taken on a particular significance in antitrust law. *See*, ABA Antitrust Section, Antitrust Law Developments, 121-39 (2d ed. 1984). To accept the proposition that once such an act has been committed, an action to recover for resulting damages is never barred detracts from that significance.[10] More importantly, D & H's position is not supported by law:

> Continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action. It remains clear nonetheless that a newly accruing claim for damages *must be based on some injurious act actually occurring during the limitations period*, not merely the abateable but unabated inertial consequences of some pre-limitations action. (emphasis added)

Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 784, 46 L.Ed.2d 643 (1976). In other words, where all the damages complained of necessarily result from a pre-limitations act by the defendant, the cause of action does not "continually accrue" into the limitations period. *See Imperial Point Colonnades Condominium v. Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132

[10] D & H asserts that the four-year-period of 15 U.S.C. 15b functions merely as a limitation of damages. That is, a successful complainant can only recover for damages occurring during the four years prior to the filing of the complaint, regardless of when the acts that caused those damages occurred. Trans. at 33.

(1977); *see also Woodbridge Plastics, Inc. v. Borden, Inc.*, 473 F.Supp. 218 (S.D.N.Y.1979).

Consequently, it appears doubtful at this juncture that D & H can recover damages resulting from acts taken by Conrail prior to the limitations period. D & H's position "resembles that of a disappointed patron of the theater, when turned away from the theater at eight o'clock because the performance is sold out, his exclusion occurs at eight, not during the performance or when it concludes at eleven o'clock." *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), *cert. denied*, 444 U.S. 900, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979).

Nevertheless, dismissal is inappropriate. Conrail asks this court to dismiss portions of D & H's claim. Such a piecemeal approach to an antitrust claim is improper. *See Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Moreover, facts may be presented which substantiate a determination of a continuing violation. For example, D & H's damages may not *necessarily* result from pre-limitations acts. Timely acts of Conrail might have contributed to the damages associated with pre-limitations acts. *See Imperial Point*, 549 F.Supp. at 1035-44. As a factual question is presented, Conrail's motion to dismiss based on the statute of limitations is denied. *See Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 731-32 (8th Cir.1964).

D. *Relief*

Conrail finally argues that much of the relief requested by D & H is unavailable in this court. Conrail claims that the doctrine announced in *Keogh v. Chicago & N.W. R.R.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922) precludes the award of damages to D & H. In *Keogh*, a shipper's complaint alleged that rates filed with the ICC by the defendants had been fixed pursuant to an agreement prohibited by the Sherman Act. The

shipper claimed treble damages measured by the difference between the rates set pursuant to the unlawful agreement and those that had previously been in effect. The Court determined that the shipper could recover no damages:

> The Court reasoned that the ICC's approval had, in effect, established the lawfulness of the defendant's rates, and that the legal right of the shippers against the carrier had to be measured by the published tariff. It therefore concluded that the Shipper could not have been injured in his business or property within the meaning of the [Sherman Act.]

Square D. Co. v. Niagra Frontier Tariff Bureau, —— U.S. ——, 106 S.Ct. 1922, 1926, 90 L.Ed.2d 413 (1986) (*construing Keogh*).

The present complaint does not implicate *Keogh*, however. Plaintiff's complaint does not put into issue the lawfulness of the defendant's rates under the Interstate Commerce Act. D & H does not seek damages as a shipper who has been charged unreasonably high rates. D & H seeks to establish that Conrail engaged in a pattern of conduct specifically designed to eliminate D & H as a competitor. The plaintiff's damages will be measured not by the difference between existing rates and some hypothetical rates, but by business losses it has allegedly sustained. Such a measure of damages is perfectly acceptable in an antitrust action. *See e.g. Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927); *First National Bank v. British Petroleum Co.*, 324 F.Supp. 1348 (S.D.N.Y. 1971); *Transkentucky*, 581 F.Supp. at 767.

Conrail next argues that injunctive relief is precluded by Section 16 of the Clayton Act, 15 U.S.C. § 26, which permits private injunctive relief in antitrust actions.

> [P]rovided, [T]hat nothing herein contained shall be construed to entitle any person, firm, corporation,

> or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of [49 U.S.C. § 1 *et seq.*] in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

15 U.S.C. § 26. D & H's request for injunctive relief is broad, and much of it may indeed be barred by 15 U.S.C. § 26. The court is not prepared at this stage of the proceedings, however, to rule out all forms of injunctive relief. *See Transkentucky*, 581 F.Supp. at 768. Consequently, Conrail's motion to strike D & H's claims for injunctive relief is denied without prejudice.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of June, one thousand nine hundred and ninety.

Docket Number 89-9034

DELAWARE & HUDSON RAILWAY COMPANY,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

[Filed Jun. 6, 1990]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellee CONSOLIDATED RAIL CORPORATION

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 40224

IOWA POWER AND LIGHT COMPANY

v.

BURLINGTON NORTHERN RAILROAD COMPANY

EXCERPTS FROM THE VERIFIED STATEMENT OF WILLIAM J. BAUMOL

(May 21, 1990)

* * * *

The essence of the matter at issue here is the desire of Iowa Power and Light Company (IPL) to obtain reciprocal switching service from BN in order to permit IPL to utilize the facilities of Chicago and North Western Transportation Company (CNW) and Union Pacific Railroad Company (UP) to transport coal from the Powder River Basin to IPL's generating facilities at Council Bluffs, Iowa. The transportation in question can also be provided by BN as through-route service. The substantive issue is the proper price at which the switching service should be offered by BN.

Pricing is, of course, something that affects the interests of the public profoundly, and not just those of IPL, BN and CNW/UP. The desires of those parties on the level of the switching rate in this particular situation seem fairly obvious, but the nature of the price that most effectively promotes economic efficiency, thereby serving the public interest, is not quite so obvious. Nevertheless,

the pertinent principles are well known and, as will be shown here, those principles lead to an unambiguous resolution of the pricing matter under dispute.

Here I will undertake to describe the economic principles that govern efficient pricing of a service such as BN's reciprocal switching service, and to explain the logic of those principles. I will show that the efficient pricing rules are profoundly affected by two attributes of the reciprocal switching service at issue in this proceeding: (a) the fact that it is not an end product, in itself but is, rather, just a component of the final product which is the transportation of coal from the mine to IPL's generating station at Council Bluffs, Iowa; and (b) the fact that BN, the supplier of the switching service component of the final product, is also a supplier of the remaining components of the final product, but BN is not the only provider of those other components.

The relevant pricing principle (to which I will refer as "efficient component pricing") is that the supplier of such a product component is entitled to receive for it a price that makes that supplier indifferent as to whether the other components of the final product are provided by itself (that is, the traffic is carried entirely over its own lines, from origin to destination), or whether, instead, those remaining components are supplied by others (the traffic is carried over a joint route operated in whole or in part by competitors). This rule follows the well-known economic principle that efficiency requires the price of a product to cover its full incremental cost, *including its opportunity cost.* That is so because if the supplier of the component in question receives for it a price that covers its full opportunity cost, that means by definition that it will be just as well off whether the rest of the product is supplied by itself or by others—it will be indifferent between the two arrangements.

It will be shown that this is not only the pricing rule required by economic efficiency—it is also the rule im-

posed by economic forces in competitive markets. That is, in competitive markets such product components are in fact priced in the manner described. This observation is of critical importance given the fact that in such highly competitive circumstances it is generally agreed that regulatory intervention on pricing matters is not called for by general welfare considerations, and that in such a case any price changes imposed by regulation will be detrimental to the public interest.

* * * *

There are many cases in reality in which (1) the supplier of a critical component of a final product also supplies the final product in which that component is used, but (2) where that firm is only one of a number of enterprises that supplies or is prepared to supply the other component(s) of that final product. A clear example is a pharmaceutical manufacturer, Firm A, which is the sole supplier of medical ingredient X on which it holds a patent. The final product may require other medical ingredients, capsule cases, packaging and marketing services, all of which Firm A can also provide, though it is by no means the only enterprise that is in a position to do so.

Efficiency clearly requires that provision of capsule cases, packaging, marketing services, etc., each be left in the hands of those firms that can do it most efficiently (cheaply), *i.e.*, those who can provide these components by means that reduce to a minimum the value of the labor, fuel, raw material and other inputs used in producing the components.

Looked at in this way, the choice is often interpreted as a "make-or-buy decision" on the part of Firm A, the supplier of patent-protected component X. Firm A should make the capsule cases, the packaging, etc., if and only if it is the more-efficient supplier of these items. Otherwise, the public interest dictates that Firm A should

buy those components from a rival supplier who can provide them more efficiently than Firm A can do so for itself.

Whether Firm A will, in fact, make the efficient choice voluntarily is, clearly, a matter of the relative price of the competing services of a component Y. If the price of Y when offered by a rival supplier is lower than the cost that Firm A will incur when making the item for itself, it will pay A to buy component Y, rather than making it. Efficiency in pricing, then, requires component Y to be priced below Firm A's pertinent costs if the rival firm is the most efficient supplier of Y, and it requires that price to be above Firm A's cost if Firm A is the more-efficient provider of Y.

* * * *

Without implying that BN does in fact have any market or monopoly power derived from its ownership of the switching facilities over the transportation of coal from the Powder River Basin to IPL's Council Bluffs generating facilities, it is nevertheless appropriate to examine what regulatory rules should govern if that were so. It is therefore necessary for me to proceed on the hypothetical assumption that BN does have such power and to examine whether its pricing behavior nevertheless is consistent with the behavior of a competitive supplier in otherwise similar circumstances. For, as I have just shown, if the hypothetical monopolist nevertheless prices as a competitor would have done, that pricing must be considered consistent with the public interest and cannot be deemed anticompetitive.

How, then, would a firm, similar to the hypothetical monopolist (except that it operates in competitive circumstances) price a component of which it is the sole supplier, when it also supplies other components of the final product and does so in competition with others? An illustration will make the answer clear. For the prod-

uct with a sole supplier really to be competitive there must be close substitutes available. Consider the hypothetical owner of a piece of land that is a good location for a retail establishment. There are other nearby pieces of land available, so that the landowner is in no position to charge a monopoly rent for his property. A retail chain approaches the landlord and proposes to construct an outlet upon that land, but the landlord has also been considering doing so on his own, and has calculated that he can expect to earn $100,000 in net profit from operation of such a shop. In this case, how much will the landlord charge the retail chain for use of the land if he is to be induced to rent it to that organization? The answer is obvious. The landlord will expect interest on the money he has invested in the land. He will also expect, and receive, compensation for any improvements the tenant requires. But, in addition, he will also expect and receive full compensation for the $100,000 in profits he foregoes by not using the land to construct a retail outlet of his own.

Of course, the prospective tenant may or may not choose to accept such an offer. But in a free competitive market he cannot expect to get the land more cheaply than that, because rather than accept any lower price, the landlord will find it rational to do the retailing himself.

Only a moment's consideration is needed to confirm that pricing of this sort is normal business practice, that it will occur under the most competitive of conditions, and that there is nothing inequitable about the price in question as the rental fee offered by the landlord to the tenant.

The issue now before us is precisely analogous, and in regulatory hearings dealing with similar matters it has actually been customary to use the landlord-tenant nomenclature to get at the substance of the issue. Here, BN is the landlord who owns the switching facilities, and IPL wants CNW/UP to become a tenant in use of those

facilities. The activity for which those facilities are to be used is, of course, not retailing, but the transportation of coal from the Powder River Basin to the IPL plant. There is nothing inherently different between the pricing issue raised by IPL in this proceeding and that in the retailer-landlord illustration. Without committing myself at this point, one way or the other, on the degree of competitiveness of the activity in question, it is clear that BN will be pricing switching in a competitive manner if it makes a genuine offer to CNW/UP (or to IPL which appears to be acting as CNW/UP's de facto agent here) to give it the use of its facilities at a price that includes all the incremental costs stemming from CNW/UP's tenancy, plus any opportunity cost it incurs as a result, consequent upon whatever amount of transportation business IPL decides to switch from BN to CNW and/or UP. The competitive model shows that, at any lower price, BN will receive less than full compensation for the rental of its facilities and that it is then justified in insistence upon retention of the transportation activity for itself, just as our hypothetical retailer landlord would insist, at a similarly inadequate price, on doing the work of retailing himself.

To say that such pricing is unacceptable is tantamount to rejecting competitive market performance as the proper guide for pricing. I doubt whether any of the parties to this case is prepared to take such a position.

*   *   *   *

What is actually the substance of the issue in the pricing of components? Whose interests are really at stake? The experience derived from the history of competitive access cases before the Interstate Commerce Commission reveals the answer. In all these cases, including that currently before the Commission, the issue has been a matter of the division of the total revenues from the sale of the final product, between the landlord and the tenant when that product is supplied jointly by the two

parties. In the current case, if line-haul transportation from the Powder River Basin is provided by CNW/UP and switching is supplied by BN, the real issue is the division of the total revenue among the carriers, along what amounts to a joint route. In terms of my earlier illustration, if the market permits a charge of $30 per unit for the entire product, the question to be settled is the proportion of the $30 that goes to each of the suppliers. Where that is in dispute it is normal to find those suppliers to be the directly contending parties. Where that is so, their goals are clear—each side seeking legal intervention to force a redivision of the revenues that is in its own favor.

The efficient component-pricing rule provides a competitive-market standard (that is, an efficiency standard) for settlement of such disputes. It yields an unambiguous price for the switching services, one that is called for by the public interest.

No regulatory intervention is needed to impose that price. Where price is set by arms length negotiations between the parties, it serves the wholesaler's ("the landlord's") interests to offer its product component at a price consistent with the efficient component-pricing rule. Any price lower than that is clearly not in its interest, while any price that excludes a more-efficient supplier of the remaining components may force the wholesaler to produce the item itself, at its own higher costs (that is, it will force the wholesaler to "make" the remaining components itself when it would have been cheaper to "buy" them).

Not only will it pay the wholesaler to offer, voluntarily, to provide its component at a price approximating the efficient component-price level. Once that offer is made, it will also pay a more-efficient retailer to accept it because such a price enables that retailer to reap profits commensurate with its own efficiency margin over the wholesaler, in performance of the retailing task.

Thus, in the absence of regulatory intervention, the market will work here with its usual efficacy. The two parties, negotiating without constraint, will find themselves induced by pursuit of self interest to converge upon the component price that best serves the public interest.

It is noteworthy that regulatory intervention, or even its prospect, can change all that. In particular, it can lead the retailer to reject the wholesaler's *bona fide* offer for strategic purposes, hoping thereby to convince the regulator that the market was not working, and that the wholesaler was unwilling to make legitimate price offers. If it succeeds in this strategy, the regulatory agency may be induced to force the wholesaler to provide an interfirm cross subsidy for the benefit of the retailer. Thus, the mere threat of regulatory intervention can lead to a breakdown of the automatic market processes and prevent adoption of the efficient component price.

* * * *

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Ex Parte No. 445 (Sub-No. 1)

INTRAMODAL RAIL COMPETITION

EXCERPTS FROM THE VERIFIED STATEMENT OF
WILLIAM J. BAUMOL AND ROBERT D. WILLIG

(May 28, 1985)

* * * *

I. *The Competitive Norm as the Appropriate Guide*

Before turning to the three proposals themselves it is necessary to review briefly the criteria on which we believe they should be evaluated. Happily, these standards —the attributes of free competitive markets—are not disputed matters, but are, on the contrary, widely accepted by regulators, lawmakers and our fellow economists. Nor is there any disagreement on the basic objective to be served—the promotion of the public interest through the encouragement of economic efficiency. As we will show, however, this generally accepted goal and the accompanying standards for appropriate regulation provide clear economic ground rules for regulation of intramodal rail competition.

Turning, then, to the standards appropriate for evaluation of the three proposals here at issue, these may be encapsulated in the following observations:

1. The standard by which any system to regulate rates should be judged is whether it promises to serve as an

effective proxy for the free competitive market—that is, whether it will promote performance in the regulated arena that is as similar as possible to that which would be induced by competition. It is widely recognized that competition weeds out inefficiency, encourages productivity and technological progress, and generally benefits society by providing a combination of goods and services whose qualities and attributes are adapted to the demands of consumers using up as small a quantity of resources as possible in the supply of these products. In markets where competition is effective, no regulation is necessary. Where regulation is required, it should replicate the results of competition as closely as possible. [footnote omitted]

2. Several necessary requirements of such procompetitive regulation are particularly important for evaluation of the proposals before the Commission:

First, independence in pricing is the cornerstone of competition. In unregulated markets, including most of the markets in which rail shippers operate, prices may be set independently by manufacturers, suppliers and retailers for the service that each provides. Even though cooperation by different firms is frequently essential in getting finished goods and services to the market, independent pricing power is still exercised or is the basis for negotiations leading to prices set by coordinated ventures.

Second, pricing in competitive markets is responsive to demand conditions. Such responsiveness to demand is critical to the efficient allocation of resources. It assures the availability of capital and other inputs to those activities whose outputs clearly justify their costs, and denies such inputs to activities whose benefits do not outweigh their costs.

Third, competitive prices are those that in the long run just permit the most efficient competitors to cover the total

costs they must incur in supplying the services desired by customers. If, unlike what happens in competitive markets, prices are artificially held by regulation below the costs of efficient supply of a particular service or set of services, in the long run those services will not be supplied, while in the short run the quality of those services and the efficiency with which they are provided can be expected to deteriorate.

Similarly, if prices are artificially forced above competitive levels or other means are used to protect inefficient firms from the competition of their more efficient rivals, the public will have to pay the excess cost and the economy will suffer from the resulting waste of resources.

* * * *

3. Procompetitive regulation is regulation which promotes these competitive precepts. To the greatest degree possible, it permits firms to set independent prices at levels that are based on demand conditions and that cover their firms' total costs when they operate efficiently. Procompetitive pricing regulation only restricts a dominant firm's freedom (a) to set rates which induce shippers to use inefficient combinations of services, or (b) to charge unreasonably high rates (*i.e*, rates which yield monopoly profits), or (c) to adopt rates which can serve as instruments of predation. These are the only types of regulatory interference in price setting that are justified, since they correspond to the ways in which a firm's pricing behavior can conflict with the public interest.

* * * *

It bears emphasizing that the one potential source of pervasive inefficiency in the pricing of interrailroad services is the presence of well-intentioned but inappropriate regulation which prevents the forces of competition and self interest from inducing the parties to reach voluntary agreements that promote the public interest. Not only the occurrence of such intervention, but even just the

threat that such intervention can be elicited if negotiations break down between two vertically related railroads, may suffice to undermine the possibility of agreement. If either of the parties believes it can gain from such regulatory intervention, its interests may best be served by unrealistic and unacceptable pricing offers which, while giving the appearance of genuine bargaining, in fact insure that no mutually acceptable agreement can be reached. Thus, it is only where ill-advised regulation freezes archaic relationships or requires continued provision of services at rates that have no economic justification, or where it can realistically be hoped by some parties that reimposition of such regulation can be elicited, that pervasive incentives for inefficiency arise.

* * * *

Another point which should be emphasized is that the cancellation of a particular joint rate can never in itself be inefficient or anticompetitive, provided that the cancelling railroad offers to establish a competitive through rate in its place. It is only the rates that remain, or are set, after cancellation that may have anticompetitive effects. In fact, given past regulatory practices, the widespread cancellation of joint rates in itself inherently tends to be procompetitive, since it permits the replacement of archaic, involuntary joint rates and divisions by the independent pricing of individual services that is fundamental to the efficient working of the competitive mechanism.

* * * *

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Ex Parte No. 445 (Sub-No. 1)

INTRAMODAL RAIL COMPETITION

EXCERPTS FROM THE
REPLY VERIFIED STATEMENT OF
WILLIAM J. BAUMOL AND ROBERT D. WILLIG

(July 5, 1985)

* * * *

We, along with most economists and regulators who have studied the subject, believe that the ultimate test for effective competition is economic efficiency. An effectively competitive market is a market in which (1) the relative prices charged by *competing* suppliers of goods and services encourage customers to patronize the least-cost (*i.e.*, efficient) suppliers of each good and service; (2) the relative prices charged for *different* goods and services accurately reflect relative scarcity, thereby enabling consumers (and society) to maximize the social welfare available from scarce economic resources; and (3) efficient firms have the opportunity, in the long run, to cover overall cost and earn returns equal to their cost of capital, thereby encouraging optimal levels of capital investment. Competition is desirable not because it safeguards the interests of individual competitors, but because it produces benefits for consumers in terms of price, efficiency and product quality.

* * * *

True competition is not enhanced by arrangements that ensure the simultaneous presence of a multiplicity of firms, but do so by means entailing inefficiencies, excessive prices or other forms of damage to the public interest. For example, a form of regulation that forces the most efficient enterprise in an industry to charge prices well above its incremental costs may well succeed

in preserving that firm's less efficient competitors, and so it may expand the number of enterprises in the industry above what it would otherwise have been. But, contrary to superficial appearance, this procedure is no stimulus to competition. On the contrary, it stultifies the competitive forces and entails a heavy cost to consumers. It is surely contradictory to what advocates of true competition have in mind.

The uneconomic imposition of through routes and joint rates can be precisely analogous to the spurious competitive policy that was just described. If it entails limiting the payments received by one railroad whose facilities are to be used by a second railroad so that the process involves an implicit subsidy to the latter, then this second railroad may find it profitable to continue to carry some or all of the traffic in question whether or not its presence is warranted by the relative efficiency of its service. The coexistence of a multiplicity of enterprises will be preserved, but only by means of an interfirm cross-subsidy which is a clear impediment to economic efficiency and consumer welfare.

* * * *

[T]he proposal we espouse here constitutes a vehicle for the general promotion of economic efficiency and the public interest. The central standard of the AAR/NITL/CMA proposal is composed of two elements—a set of rules against anti-competitive behavior, and, under the protective umbrella of those rules, reliance upon the market mechanism to yield beneficial results from a system of voluntary negotiations. Voluntary negotiations can, of course, lead to undesirable results if one of the parties is in a position to use them successfully as a device to stifle competition, that is, as a predatory instrument. Predation is highly unlikely in the rail industry.*

* * * *

* Predation involves three separate and necessary elements: (1) a firm takes action as a result of which it sustains losses or foregoes profits for some limited period of time; (2) those losses must be so substantial and of such duration as to force the exit of some of the firm's current competitors or to forestall the activities of a firm or firms that would otherwise have undertaken business in competition with the predator; and (3) the departure of these rivals must be necessary and sufficient to permit the incumbent to raise prices sufficiently after its rivals' exodus from the market to raise prices sufficiently above the competitive level and to sustain such excessive prices for a period of time sufficient to yield monopoly profits that exceed the losses incurred in driving the rivals from the field. In the absence of any one of these three elements, the alleged predator will have nothing to gain by attempting to drive a rival from the field through a profit sacrifice, for the attempt will either be doomed to failure or it will be incapable of producing rewards sufficient to justify the undertaking.

So long as revenue shares are allocated by the competitive interactions of rail carriers with the right to price independently, each railroad has a strong incentive to cooperate with other carriers that can provide service more cheaply than the railroad can supply it itself. In the absence of regulated revenue shares, a railroad has a strong incentive to pay enough to a cooperating carrier, or to allow a cooperating carrier a sufficient revenue share to permit it to cover its costs, provided only that the cooperating carrier is the efficient choice for the job. This follows because the rail carrier would earn less from its alternatives—either doing the job itself at a higher cost, compensating a less efficient cooperating carrier for its higher costs, or forgoing the service entirely and thereby losing its own portion of the net revenues available from the service.

* * * *

In these circumstances, each of the parties in a voluntary negotiation over the terms of a vertical relationship such as a joint route will earn the greatest profit available to it if it selects as its partner, in each transaction, the entity that is in a position to carry it out most efficiently and cheaply. Railroad I benefits by directing the traffic over the tracks of Railroad II, rather than over its own single line route, when Railroad II can do the

job more efficiently, thereby avoiding the unnecessary expenditure of revenue offered by the market for the transportation service.

* * * *

This generalization can be brought down to earth by consideration of its implications for the revenue shares that will emerge from voluntary negotiations in the long run. Suppose Railroad I has determined, on the basis that has just been reviewed, that it is more profitable for certain traffic to flow over the joint route than over its competing single line route. Then it would surely not serve Railroad I's long run interests to insist (even if it were in a position to do so) on a sharing arrangement which compensated Railroad II so badly that it would jeopardize Railroad II's continued operation or threaten the efficiency of Railroad II's activities. In a system of market constrained voluntary negotiations effectively screened from anticompetitive behavior (*i.e.*, predation), each of the vertically related partners has a critical stake in the continued operation and continued efficiency of the most efficient source of the vertically related services available to it.

* * * *

The entire matter can be reduced to common sense and its practicality can be made clear by a simple observation. Railroad I's choice between a through route and its own single line route is precisely analogous to a make-or-buy decision in a manufacturing industry. Should a manufacturer of portable radios make its own batteries or should it purchase them from others? That is precisely the same as Railroad I's choice between the use of Railroad II's facilities or its own to traverse a part of the route, that is, to provide a component of the final transportation product. It is obvious why, when the market for batteries is competitive, it is generally agreed that the market forces will lead the radio maker to arrive at the correct make-or-buy decision, that is, to select the most efficient producer of batteries.

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CURRICULUM VITAE OF PROFESSOR WILLIAM J. BAUMOL

BSS College of the City of New York, 1942
Ph.D. University of London, 1949

1942-1943 and 1946: Junior Economist, U.S. Department of Agriculture
1947-49: Assistant Lecturer, London School of Economics
1949—Department of Economics, Princeton University (Professor since 1954)
1971—Department of Economics, New York University (Professor)
Current: Joint Appointment, Professor of Economics, Princeton and New York Universities

Awards and Honors:

1953 Fellow, Econometric Society
1957-58 Guggenheim Fellow
1965 Honorary LL.D., Rider College (Trustee Emeritus)
1965-66 Ford Faculty Fellowship
1968 Joseph Douglas Green 1895 Professor of Economics, Princeton University
1970 Honorary Fellow, London School of Economics
1971 Member, American Academy of Arts and Sciences
1971 Honorary Doctorate, Stockholm School of Economics
1973 Honorary Doctor of Humane Letters, Knox College
1973 Honorary Doctorate, University of Basel
1975 John R. Commons Award, Omicron Delta Epsilon
1975 Townsend Harris Medal, Alumni Association of the City College of New York
1977 Member, American Philosophical Society
1982 Distinguished Fellow, American Economic Association
1984 Distinguished Member, Economic Association of Puerto Rico
1986 Winner, Association of American Publishers 1986 Award for Best Book in Business, Management and Economics for *Superfairness: Applications and Theory*

1987 Recipient, Frank E. Seidman Distinguished Award in Political Economy
1987 Member, National Academy of Sciences

Professional Activities:

Member, Advisory Board, Price Institute for Entrepreneurial Studies
Member, Advisory Committee, World Resources Institute
Member, Editorial Advisory Board, Supreme Court Economic Review
Member, Board of Trustees, Joint Council on Economic Education
Member, Advisory Committee, Center for Entrepreneurial Studies, Graduate School of Business Administration, New York University
Member, Joint Advisory Committee on Behavioral Economics of the Russell Sage Foundation and the Alfred P. Sloan Foundation
Past President, American Economic Association
Past President, Eastern Economic Association
Past President, Association of Environmental and Resource Economists
Past President, Atlantic Economic Society
Past Chairman and Member, Economic Policy Council, State of New Jersey
Past Chairman, Committee on Economic Status of the Profession, American Association of University Professors
Past Vice President, American Association of University Professors
Various times on Board of Editors of *American Economic Review*, *Journal of Economic Literature*, *Management Science*, and *Kyklos*
Director, Consultants in Industry Economics, Inc.
Various consulting activities for government and industry.

Books Published:

Economic Dynamics, 1951; 2nd edition, 1959; 3rd edition, 1970.

Welfare Economics and the Theory of the State, 1952; 2nd edition, 1965.

Economic Processes and Policies (with L. V. Chandler), 1954.

Business Behavior, Value and Growth, 1959; 2nd edition, 1966.

Economic Theory and Operations Analysis, 1961; 2nd edition, 1965, 3rd edition, 1972; 4th edition, 1976.

The Stock Market and Economic Efficiency, 1965.

Performing Arts: The Economic Dilemma (with W.G. Bowen), 1966.

Precursors in Mathematical Economics: An Anthology (with S. M. Goldfeld), 1968.

Portfolio Theory: The Selection of Asset Combinations, 1970.

Economics of Academic Libraries (with M. Marcus), 1973.

The Theory of Environmental Policy (with W. E. Oates), 1975; 2nd edition, 1988.

Economics, Environmental Policy, and the Quality of Life (with W. E. Oates and S. A. Batey Blackman), 1979.

Economics: Principles and Policy (with A. S. Blinder), 1979; 2nd edition, 1982; 3rd edition, 1985; 4th edition, 1987.

Public and Private Enterprise in a Mixed Economy (editor), 1980.

Contestable Markets and the Theory of Industry Structure (with R. D. Willig and J.C. Panzar), 1982; revised edition, forthcoming.

Inflation and the Performing Arts (editor with H. Baumol), 1984.

Productivity Growth and U.S. Competitiveness (editor with K. McLennan), 1985.

Superfairness: Application and Theory, 1986.
Microtheory: Applications and Origins, 1986.
Productivity Performance: The Long View (with Sue Anne Batey Blackman and Edward N. Wolff), forthcoming.

Plus numerous journal articles.

SHERMAN ANTITRUST ACT

Section 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.